LAW AND CONTEMPORARY PROBLEMS

THE WAGE AND HOUR LAW

(TABLE OF CONTENTS ON INSIDE GOVER)

SCHOOL OF LAW • DUKE UNIVERSITY

VOL. VI SUMMER, 1939 No. 3

LAW AND CONTEMPORARY PROBLEMS

A QUARTERLY PUBLISHED BY THE DUKE UNIVERSITY SCHOOL OF LAW

Professor David F. Cavers, Editor

Assistant Professor Paul H. Sanders, Assistant Editor

Publication Board: Professor L. L. Fuller, Dean H. C. Horack, Professor Malcolm McDermott

Volume VI SUMMER, 1939 Number 3

CONTENTS

THE WAGE AND HOUR LAW

Paul H. Sanders

Special Editor for this Symposium

PAGE

Foreword 321

Regulation of Wages and Hours Prior to 1938 ..... *Frank T. de Vyver* 323

The Coverage of the Fair Labor Standards Act and Other Problems in Its Inperpretation ..... *Frank E. Cooper* 333

The Organization and Functioning of Industry Committees under the Fair Labor Standards Act ..... *Z. Clark Dickinson* 353

The Administration and Enforcement of the Fair Labor Standards Act ..... *Samuel Herman* 368

The Child Labor Provisions of the Fair Labor Standards Act ..... *Katharine Du Pre Lumpkin* 391

The Economic Coverage of the Fair Labor Standards Act .... *Carroll R. Daugherty* 406

Favorable Economic Implications of the Fair Labor Standards Act ... *Otto Nathan* 416

Economic Hazards in the Fair Labor Standards Act ..... *Noel Sargent* 422

How the Supreme Court May View the Fair Labor Standards Act 431

(A) An Opinion Holding the Act Constitutional ..... *Robert L. Stern* 433

(B) An Opinion Holding the Act Unconstitutional ..... *R. S. Smethurst* 444

State Fair Labor Standards Legislation ..... *Louise Stitt* 454

Legislative History of the Fair Labor Standards Act ..... *John S. Forsythe* 464

Index 491

MONTHS OF ISSUE: JANUARY, APRIL, JUNE, AND OCTOBER

Subscription Price, $2.00 per Annum Foreign Subscriptions, $2.50 75 Cents per Number

(A supply of copies of each issue is provided to fill orders for single numbers)

Address all communications to Law and Contemporary Problems
Duke Station, Durham, North Carolina

Entered as second-class matter, October 27, 1934, at the post office at Durham, North Carolina, under the Act of March 3, 1879.

LAW AND CONTEMPORARY PROBLEMS

VOLUME VI SUMMER, 1939 NUMBER 3

FOREWORD

Regulation of wages and hours and the elimination of child labor have occasioned much discussion in legal and other social science journals since the beginning of the present century. Legislation, proposed and enacted, suggested constitutional amendments, litigation and judicial decisions bearing on these subjects, all have called forth commentaries and evaluations in large number. In contrast, the Federal Fair Labor Standards Act (more generally known, perhaps, as the Wage and Hour Law), undoubtedly the most extensive program of this kind yet enacted into law in the United States, has received, thus far, surprisingly little critical treatment. It may well be admitted that the period since the Act became operative on October 24, 1938, is too brief to reveal all the problems which may be expected to develop in its administration. Nevertheless it is believed that the principal points of difficulty may now be ascertained and studied. Furthermore, in presenting such a study in a symposium at this time it should be noted that the importance of the problems considered will be heightened this October at the end of the Act's first year. After that time the present standards become inoperative and the millions of employees covered by the provisions of this legislation cannot be paid less than the new 30-cent minimum hourly wage nor can they be worked in excess of 42 hours weekly without extraordinary compensation.

In a symposium such as this there is always the risk that the value of the studies presented will be lessened by substantial change in the law under discussion. Although this legislation has quite rightly been considered more far-reaching in its implications than any federal legislation since the National Industrial Recovery Act there was, on the whole, little articulate opposition during the first six months of its existence. At the beginning of the present session of Congress Administrator Andrews himself asked for certain amendments to the Act. Subsequent legislative developments concerning amendments have indicated that opposition to wage and hour regulation in certain areas—vocational as well as geographic—if not particularly vocal, has been nonetheless real. More recently, the hearings conducted by the Administrator on the recommendation of the Textile Industry Committee have provided a sounding-board for the first intensified manifestation of antagonism to the Act. While these developments have tended to dim the roseate glow of what may have appeared to be an "era of good feeling," it does not seem likely at the moment

that substantial amendment of the Act will come at this session. Indeed, it is quite possible there will be no amendment of any sort.

The organization* of the symposium and the material covered by the articles will, in the main, be apparent from an examination of the table of contents. Professor de Vyver's article does not attempt a detailed treatment of wage and hour legislation prior to the Fair Labor Standards Act. Its purpose, rather, is to give the reader, in brief compass, a survey of what has been done in this field both by the states and the Federal Government and thus provide orientation for the more detailed consideration of the problems arising under the present Act.

It does not appear that a decision on the constitutionality of the Act is immediately in prospect, yet it may be taken for granted that the test will be made eventually and that, until that time, considerable speculation will be indulged in. Messrs. Stern and Smethurst have made use of a novel method in presenting their speculations concerning the constitutional issues. Agreeing upon a statement of facts, each of the authors has prepared an imaginary Supreme Court opinion, one upholding and the other attacking the Act's constitutionality. Neither writer is thus taking the position that his opinion is the one that will be handed down. The viewpoint of each is rather —here is a framework the Supreme Court could use in deciding the constitutional validity of the Act.

One might receive the impression that the economic angle is receiving more than its share of attention in this symposium. In comparatively brief articles, Mr. Daugherty supplies the answers to such questions as how many employees, in what industries, and in what states are covered by the Act, and Professor Nathan and Mr. Sargent point respectively to the advantages and disadvantages, economically speaking, which may be expected to flow from its existence and enforcement. The other articles as well will be found to stress economic considerations. But this is consistent with a realistic appraisal of the Act. For the root controversy is economic. Such legal and political problems as coverage, interpretation, administration, exemptions, amendments, and even repeal, all will in the long run be largely determined by economic factors—to the understanding of which it is hoped this symposium will contribute.

P. H. S.

* Because Mr. Forsythe's illness prevented the completion of his article at the appointed time, it has been placed last rather than near the beginning of the symposium as would ordinarily be indicated.

REGULATION OF WAGES AND HOURS PRIOR TO 1938

FRANK T. DE VYVER*

Passage of the federal wage and hour bill did not represent a sharp break with *laissez faire* in this field. Rather did that law mark a logical step in a movement that, both here and abroad, has been progressing for many years. As a matter of fact the Federal Government has been making attempts to raise the standards for various groups of workers since 1840. From an economic point of view, federal legislation of this sort differs from state regulation principally in extent of coverage. Any history of wage and hour legislation must, therefore, include the interesting story of state laws.

Before tracing the development of state and federal interferences with the "natural laws" of economics, however, a distinction should be drawn between such interferences on the basis of motivating principles. Such classification is necessary not so much for describing historical development as to clear the air for future discussions lest advocates be striving for one type of law and the opponents be arguing against an entirely different sort. Motives, to be sure, are exceedingly difficult to fathom and undoubtedly reasons given to legislative bodies and courts are not always the actual ones. Furthermore, different interests may sponsor the same bill for unrelated, and, perhaps, inharmonious, reasons.

Classified on the basis of motives, hour legislation may be divided into five groups. In the first place, protection of health has been the underlying reason for a considerable part of American legislation. Certainly the legal reduction of weekly hours from 60 to 50 can be classed in no other way. Somewhere in the demand for a downward trend of hours the notion that unemployment can be cured by having every one work fewer hours has stimulated government action. A 30-hour a week proposal may be thus classified. Between the 30-hour and the 50-hour a week proposals lies the point above which health considerations are paramount and below which curing unemployment is the more important purpose. The third type of hour law envisages an indirect increase in wages. It is not supposed that required work can

* A.B., 1926, M.A., 1927, Oberlin College; M.A., 1930, Ph.D., 1935, Princeton University. Assistant Professor of Economics, Duke University, since 1935. Merit Examination Supervisor, North Carolina Unemployment Compensation Commission, since 1938. Research Assistant in Labor Problems at the Institute for Research in Social Sciences, University of Virginia, 1928-1930. Co-author of *Labor in the Industrial South* (1930) and *The Development of Economic Society* (1937). Contributor to periodicals on labor problems.

always be accomplished in the shorter time period; the established hours are the basic hours and extra pay is expected for overtime. In actual practice, depending on the industry, the same law may bring about better health, shared work, or increased pay. A fourth type of regulation, recently introduced in European countries, increases the usual hours of work, for the benefit of a state defense program. Such legislation has not as yet found a counterpart in this country. These four groups of hour laws affect private industry. Organized labor has likewise sought and gained special concessions from governments for work on government projects. Improved standards under such circumstances are easier to obtain by law than by collective bargaining. There is a desire here to take advantage of a relatively strong, strategic position, coupled with the desire that governmental projects shall set examples of good standards and not depress labor conditions in any degree.

Five distinct motives can likewise be found for wage regulations. The historic reason for such legislation has been to improve the lot of the lowest-paid fringe of female workers, unable because of lack of bargaining strength to help themselves. This motive is still an important one, but a different principle underlies fixing wages by law considerably above the average wages of the industry. Such legislation is based upon the so-called purchasing power theory of the business cycle. Between these first two types it is not always easy to distinguish. Whereas a 20-cent minimum is certainly directed to the mitigation of the sweating evil, opinion might differ as to the reason for a 50-cent minimum. Another type of wage-fixing has been motivated by the belief that modern economic society must be planned rather than be allowed to run its supposedly unplanned course. Wage-fixing under such a scheme becomes merely one aspect of general price-fixing. A fourth type of law has been designed to eliminate industrial warfare by establishing boards to arbitrate disputes, incidentally to fix wages. Finally, as with hour legislation, labor and its friends have sought for reasons indicated there to obtain good wages in government sponsored work by legislation rather than struggle for those wages by means of collective bargaining. Laws of the three latter types go further than merely fixing a minimum wage. They provide for the establishment of the entire range of rates including the differentials as well as the minima.

This paper will deal with the various types of laws but no attempt will be made to classify each legislative enactment that is mentioned.

HOURS

The present fair standards law provides both hour and wage regulation. Historically, however, these two phases of the employment contract have been acted upon separately.

Hour legislation has been the generally accepted state practice for many years. In 1898 the Supreme Court approved a Utah law, regulating the hours of labor for men working in mines. In that same decision was laid the foundation for future hour laws when Mr. Justice Brown, speaking for the Court, said in part:[1] "But the fact that

[1] Holden v. Hardy, 169 U. S. 366, 397 (1898).

both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality or where the public health demands that one party to a contract shall be protected against himself." This judgment had the apparent effect of overruling an earlier state court decision with respect to an Illinois maximum hours law for women.[2]

Subsequent decisions of the Supreme Court,[3] with the exception of the refusal to uphold a New York 10-hour law for male bakery workers,[4] paved the way for nation-wide acceptance of maximum hour laws for women and in some instances for men. By January 1, 1939, 44 states had limited to some degree the hours of labor for women, and five states likewise included men in the general laws. About a dozen states, furthermore, limit hours for men in specific industries.

Though hour regulation has been chiefly reserved to the states, the Federal Government has not ignored that half of the labor contract. Until recently, however, federal activities have been limited to public works and to the transportation industry. In the former, the Government merely acts as an employer in establishing working conditions. In the latter, the way for such laws is made easier by the more ready solution of constitutional problems and the fact that the safety of the traveling public is involved.

Though acting in the role of employer, the Government in fixing hours has had considerable influence upon other industries. Since 1840 when President Van Buren by executive order stipulated the 10-hour day in Government navy yards,[5] the Federal Government has led industry in hour reduction. As early as 1868, when the 8-hour day was little more than a fantastic dream, Congress decreed those hours for any workers employed on Government contracts.[6] That law, though not entirely effective, was continued and by 1936 further Congressional action had provided regulation to cover most possible cases. The Walsh-Healey Act, to be discussed later, was passed in that year.

Excessive hours having been recognized as a factor in railroad accidents, both state and federal legislation was passed to change the situation. In 1907, by a law applicable to workers on interstate railroads, Congress set 16 as the maximum number of hours to be worked in one day and provided for adequate rest periods.[7] In 1916, at the insistence of President Wilson who sought to avert a strike, Congress provided for a basic 8-hour day for railroad trainmen with no reduction in wages.[8] This latter feature seemed to prove to those opposing the act that it was in reality a method of increasing wages rather than reducing hours.

By the time of the New Deal, regulation of hours by government was a principle

[2] Ritchie v. People, 155 Ill. 98, 40 N. E. 454 (1895).

[3] Muller v. Oregon, 208 U. S. 412 (1908); Miller v. Wilson, 236 U. S. 373 (1915); Bunting v. Oregon, 243 U. S. 246 (1917).

[4] Lochner v. New York, 198 U. S. 45 (1905).

[5] 8 COMMONS, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY (1910) 85, as referred to in COMMONS AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION (4th ed. 1936) 117.

[6] 16 STAT. 77 (1868); see COMMONS AND ANDREWS, *op. cit. supra* note 5, at 118.

[7] 34 STAT. 1415 (1907), 45 U. S. C. §61 (1935).

[8] 39 STAT. 721 (1916), 45 U. S. C. §65 (1935).

accepted in general by legislatures and courts alike. Most states had accepted 10-hour laws for women and were considering regulations providing for shorter times for both men and women.[9] The federal government had likewise regulated in those fields open to it. Other state and federal laws can best be considered in a discussion of wage legislation.

WAGES

State supervision of wages has had an entirely different legislative history than that of hour legislation. Advocates of nineteenth century economic liberalism were apparently able to convince state legislatures or, in any event, the courts that any tampering with the wage side of the employment contract would surely lead to widespread unemployment among those for whose benefit the law was passed. Yet throughout the world a study of actual conditions proved that however horrible a situation might be brought about by interference with economic laws, the workers could hardly be any the worse off.

The first tempting of the divine hand of competition came in Australia. Despite the newness of the country and the comparative scarcity of the labor factor, the economic position of a large number of the working population shocked the legislature of the country into action. In 1896, after a series of studies had been made of the situation, a minimum wage law went into effect in Victoria.

The skies did not fall in Victoria and England likewise decided to tempt fate. A vigorous campaign, however, preceded legislative action. The *London Daily News,* a leading newspaper, arranged an exhibit to illustrate the evils of sweating. In a large hall typical rooms were set up, and typical workers made lace, chains, and many other commodities for the wages conspicuously posted by each booth. Such a display accomplished more than pages of statistics. In 1909 Parliament provided for the establishment of wage boards for industries with exceptionally low wage scales. Selected for the first application of the law were paper box making, chain making, lace making by machinery and wholesale ready-made tailoring.

Since the passage of the first regulations, the history of wage legislation in Australia and in England has been the story of improvement.[10] Gradually in Australia hours and wages have become matters for direct or indirect state action not only to better conditions in the sweated industries but also to settle trade disputes between employers and employees by means of compulsory arbitration. In Great Britain, over 50 boards now determine minimum wages for the industries concerned

[9] However, on March 14 of this year, in passing judgment on a statute making 56 hours the maximum in the manufacturing and mercantile establishments of South Carolina, the supreme court of that state said in part, "the Court must conclude that the Act violates the due process, equal protection and contract clauses of both State and Federal Constitutions, in that it is not a proper exercise of the police power of the State." Gasque, Inc. v. Nates, 2 S. E. (2d) 36.

Pennsylvania's maximum hour law applying to men as well as to women was held unconstitutional by the state supreme court on the grounds of improper delegation of legislative power. Holgate Bros. Co. v. Bashore, 331 Pa. 255, 200 A. 672 (1938).

[10] See ARMSTRONG, INSURING THE ESSENTIALS (1932) and MILLIS AND MONTGOMERY, LABOR'S PROGRESS AND SOME BASIC LABOR PROBLEMS (1938) for detailed discussion of the Australian and English minimum wage movements.

and, imperfect though the present situation is, the intense suffering of pre-interference days has been ameliorated.

State regulation of wages in the United States may be divided into three periods. First came the period of investigation of conditions and experimentation with laws which culminated in 1923 at the time the Supreme Court in deciding the case of *Adkins v. Children's Hospital*[11] invalidated the District of Columbia legislation. This decision was followed by another type of legislation designed to meet judicial objections but it, too, was finally declared illegal in 1936 by the *Tipaldo* decision declaring the New York law unconstitutional.[12] Finally, the way for further legislation was opened when the Court in 1937 upheld the Washington law in *West Coast Hotel Company v. Parrish*.[13]

Massachusetts passed the first minimum wage law in 1912. This action culminated more than a decade of activity on the part of the National Consumers' League. That organization, tracing its ancestry to the Consumers' League of the City of New York, had worked for many years in an attempt to obtain voluntary cooperation for a $6 a week minimum wage. Competitive conditions were such that these efforts came practically to naught with the result that after 1909 the League devoted itself to legislative efforts rather than to voluntary white lists.

The Massachusetts law provided for a wage commission with authority to establish wage boards as needed. These industry boards, after studying all the factors involved, were charged with determining the minimum rate for the particular industry. The rate thus arrived at, however, was not mandatory. Failure to comply with a board ruling merely involved the employer in publicity when the board published its rulings together with the statement of noncompliance.

Other legislatures followed the Bay State's lead and 14 additional states, Puerto Rico and the District of Columbia had enacted some type of law by 1923.[14] Much of this legislation was far from satisfactory. Massachusetts and Nebraska laws were not mandatory and, as the Commissioner in Massachusetts said in 1916, the sweat shops against whom the legislation was directed were operated by the type of employer who would pay no attention to an advisory minimum. Four of the laws (Utah, Arizona, South Dakota, and Puerto Rico) established a legislative minimum instead of leaving the actual rate for determination by a board. Such a plan is hopeless in a state with diversified interests and during a period of rapid price changes. Two of the laws (Colorado and Nebraska) never went into effect. The record for the decade had certainly not been spectacular. All of the legislation except Massachusetts' non-mandatory law was in states predominantly agricultural. Yet a start had been made and the people had had a chance to see that sweat-shop wages could be raised without entirely upsetting the entire economy.

[11] 261 U. S. 525 (1923).

[12] Morehead v. People *ex rel.* Tipaldo, 298 U. S. 587.

[13] 300 U. S. 379.

[14] Wisconsin, Minnesota, Oregon, Washington, California, Utah, Colorado, and Nebraska all enacted laws in 1913; Kansas and Arkansas added the legislation in 1915; Arizona passed a law in 1917, and the District of Columbia, Puerto Rico, North Dakota, and Texas in 1919, and South Dakota in 1923.

Probably one reason for the slow progress of wage laws was the position of organized labor. Samuel Gompers sought to make the American Federation of Labor an economic rather than a political group. "We want a minimum wage established," he wrote in 1913, "but we want it established by the solidarity of the working men themselves through the economic forces of their trade unions rather than by any legal enactment."[15] Labor, however, has always favored regulations which "affect or govern the employment of women and minors, health and morals, and employment by federal, state, or municipal government."[16] This plan of legislating for the economically weak is apparently still the official policy of the Federation.[17]

Industrial unions, however, are probably more interested in raising standards by legislation than the craft affiliates of the American Federation of Labor. The 1938 United Mine Workers Convention, for example, resolved that the national officers should submit proposed legislation to Congress, "establishing as the law of the land a six-hour day and a thirty-hour week for all industries in interstate commerce without any decrease in the established wages and a guaranteed minimum wage.[18]

All of the early laws, *i.e.*, those passed before 1923, provided that the minimum wage established by a board should be adequate to supply women with necessary costs of living and to maintain them in health and welfare. The District of Columbia law, and some others, likewise provided that the wage should be high enough to protect morals. That state maintenance of such a standard constituted the proper use of the police power had been challenged, of course. In the case of *Stettler v. O'Hara* (1914),[19] the state supreme court had upheld the Oregon law. By April, 1917, the Supreme Court, by a four to four decision, had sustained the verdict of the state court.[20] Mr. Justice Brandeis, only recently appointed to the Court, took no part in the case since he had helped prepare the brief for the state.

Such was the apparently settled constitutional status of state wage laws for women when in 1923 the Supreme Court rendered its decision concerning the minimum wage law of the District of Columbia.[21] Both Mr. Justice Sutherland's opinion for the majority and the rigorous dissents of Mr. Justice Holmes and Chief Justice Taft, have become classics to be quoted in part by all advocates of advanced social legislation.

This is not the place, however, to discuss this decision and these dissents in detail.[22] Justice Sutherland failed to see a reasonable connection between public health, safety, and morals and the regulation of wages. Presumably the justice believed that individual wages are without exception determined by the value of the service rendered. If these women contracted with their employers to receive low wages, the inconvertible conclusion was that they were receiving all they were worth. Govern-

[15] 49 INT. MOLDERS J., April, 1913; *cf.* Shishkin, *Wage-Hour Law Administration from Labor's Viewpoint* (1939) 29 AM. LAB. LEGIS. REV. 63, 64.
[16] 51 INT. MOLDERS J., Feb., 1915.
[17] See AFL PROCEEDINGS (1933) 279, (1934) 357, (1935) 451.
[18] (1938) 49 UNITED MINE WORKERS J., No. 4, p. 11.
[19] 69 Ore. 519, 193 Pac. 743.
[20] 243 U. S. 629 (1917).
[21] Adkins v. Children's Hospital, *supra* note 11.
[22] See Powell, *The Judiciality of Minimum Wage Legislation* (1924) 37 HARV. L. REV. 545.

ment regulation by interfering with freedom of contract and exacting "from the employer an arbitrary payment" was taking property without due process of law and therefore against the due process clause of the Fifth Amendment.

Persons interested in advancing social legislation thought they had discovered a possible way out in a dictum of Justice Sutherland, which seemed to imply that whereas increasing wages to protect a woman's health and morals was not a subject for legislative action, a legislature could raise a low wage to a point high enough to cover the value of the service.[23] In drafting new laws, therefore, it was provided that in addition to considering need, wage boards should establish rates "commensurate with value of service or class of service rendered." In 1924 Wisconsin took the lead in the attempt to meet the Court's objections, but it required the conditions accompanying the depression starting in 1929 to help carry additional laws through the legislatures. This second wave of legislation brought seven new laws in 1933 and in 1934 a mandatory feature to the old non-mandatory Massachusetts law. All of these laws contained the "value of service" clause designed to overcome the Supreme Court's objections. It is noteworthy, moreover, that whereas all the early laws were passed in agricultural states, the 1933 group included New York, New Jersey, Ohio, Connecticut, and Illinois as well as New Hampshire and Utah.

When in 1936 the Supreme Court by a five to four decision invalidated the New York State law, students of social legislation were greatly surprised that legal opinion on this subject had remained stationary for thirteen years.[24] The Court refused to distinguish between the "living wage" law invalidated in the *Adkins* case and the "living wage plus value of service" law of New York State and others. The Court refused to distinguish, but the following year when asked by the State of Washington to change its mind, the same court personnel did so, saying in *West Coast Hotel Co. v. Parrish*[25] that "the case of *Adkins v. Children's Hospital* should be, and it is overruled." Mr. Justice Sutherland, who had written the earlier decision, and three of his colleagues dissented.

Pennsylvania, Nevada, and Oklahoma have passed wage laws since the *Parrish* decision. This brings the total of state laws to 25 and the District of Columbia and Puerto Rico likewise have legislated. Only Oklahoma has brought men within the law;[26] the other states abiding by tried legislative and constitutional standards have included only women and minors.

Always a powerful argument against state social legislation has been that of interstate competition. Since the days of the earliest factory legislation to the present,

[23] Mr. Justice Sutherland after condemning the District of Columbia law for exacting an arbitrary payment "with no causal connection with . . . the contract or the work the employee engages to do," continued with these words: "The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored." 261 U. S. 525, 558.

[24] Morehead v. People *ex rel.* Tipaldo, *supra* note 12. [25] *Supra* note 13.

[26] The supreme court of the state has recently declared the Oklahoma law unconstitutional in so far as it affects men and minors by reason of insufficiency of title. On other grounds the court said the law met constitutional tests. Associated Industries of Okla. v. Industrial Welfare Commission, 90 P. (2d) 899 (1939).

each new proposal for reform has been greeted with the cries that it would drive industry from the state or nation. Real or imagined, this factor has had to be met. Usually the way around has been by means of federal legislation such as the present social insurance laws. Another method tried in fixing wages and hours has been interstate pacts.

This movement for cooperative action in the field of wages and hours was instigated by Governor Roosevelt of New York at a meeting of the governors in Albany in 1931. Later conferences culminated in May, 1934, when representatives from seven states (Connecticut, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, and Rhode Island) signed the first interstate compact. The pact aimed to secure uniformity of standards for conditions of employment, particularly with reference to wages and hours of women. The New York law incorporating the aforementioned "value-of-service" principle was taken as the standard. According to the terms of the compact, it was to become operative as soon as two states had ratified it and the consent of Congress had been obtained. By 1938 three states had ratified: Massachusetts, New Hampshire, Rhode Island, and Congress had given the necessary approval.[27]

The quicker method of obtaining uniform results among states whose industries compete is by means of federal legislation. In this field the spectre of states rights has always been a restraining influence. Nevertheless the present wage and hour bill does not mark the first move of the federal government into this type of legislation. At least until the Fair Labor Standards Act of 1938, however, federal legislation had been based on different principles than those embodied in state laws. State laws have attempted to mitigate the sweating evil among women and minors admittedly economically weak; federal legislation has involved either an attempt to aid weak bargainers or to legislate for the "purchasing power" theory of business cycles, or the spending theory of recovery. Occasionally these two motives have likewise involved the clearing up of a sweated industry.

Reference has previously been made to the Adamson law passed in 1916 to avert a railroad strike. The Brotherhoods were prepared to enforce their demands by striking and the railroads were apparently prepared to stand pat. The law,[28] called an 8-hour law, provided for a basic 8-hour day but likewise provided that no reduction could be made in wages until an investigating committee established by the act had reported. In this way the federal government apparently strengthened the bargaining power of the union. The Adamson Act was certainly not designed to improve conditions in a sweated industry.

The principles involved in wage rate determination under NRA codes are not readily determined. Presumably the codes were aimed at establishing a wage floor above the level to which wages had fallen during the depression. In many instances this was true but in others the obvious reason was not so much to cure the evils of a

[27] 50 STAT. 633 (1937). [28] *Supra*, note 8.

sweated industry made worse by depression but to fix a wage at the point the workers felt was a reasonable return for their services.

All of the 585 "codes of fair competition" contained definite minimum wage and maximum hour provisions. The wage minima ranged from 12½ cents an hour for the Puerto Rico needle trades to 70 cents in the construction industry codes. In codes covering 55 per cent of all the codified employees the rate was 40 cents or over; about five per cent of the codified workers were guaranteed minima less than 30 cents.[29]

Apparently if the Supreme Court had not acted unfavorably on the N.I.R.A.,[30] this attempt at federal regulation of wages would have resulted in two things. In many industries sweatshop conditions would have been ameliorated; in others actual wage-fixing on a scale not heretofore attempted would have resulted.

General minimum wage legislation having been returned to the states by the action of the Supreme Court, the Federal Government attempted to fix certain standards in those circumstances undoubtedly in its field of control. None of these wage clauses, with the possible exception of those contained in the Sugar Act of 1937, are designed to raise the standards of sweated workers. They belong more with that type of legislation designed to insure to workers upon public projects the prevailing wage in the community or industry.

The United States Housing Act of 1937,[31] for example, includes a section that all contracts "shall contain a provision requiring that the wages or fees prevailing in the locality, as determined, or adopted . . . by the Authority, shall be paid to all . . . laborers and mechanics employed in the development or administration of the low-rent housing or slum-clearance project involved." Similarly the Davis-Bacon Act with respect to public works contains a proviso that all contracts must contain a wage clause for wages at rates which the Secretary of Labor has found to be prevailing.[32]

Of more wide-spread application is the Walsh-Healey Act[33] of 1936 applying to all large federal contracts for the purchase of commodities. In addition to the 8-hour day and 40-hour week, the law provides that the Secretary of Labor shall fix minimum wages at the prevailing minimum wages for persons employed on similar work in the locality. Thus far the Secretary has fixed minima ranging from 32½ cents an hour for the manufacture of men's underwear in certain parts of the South to 67½ cents an hour in the men's hat industry.[34] Because the administrator is limited to fixing the prevailing wages, theoretically the Act should have little effect upon wage rates. Actually future studies may show that administrative discretion has served to boost the wage rates at least on the sweated fringe of the multitude of industries from whom the Federal Government purchases.

[29] (1935) 43 Mo. LAB. REV. 886.
[30] Schechter Corp. v. United States, 295 U. S. 495 (1935).
[31] 50 STAT. 896, 42 U. S. C. §1416(2) (Supp. 1938).
[32] 46 STAT. 1494 (1931), 40 U. S. C. §276a (1935) as amended by 49 STAT. 1011 (1935), 40 U. S. C. §276a (Supp. 1938).
[33] 49 STAT. 2036 (1936), 41 U. S. C. §35 (Supp. 1938).
[34] (1937) 45 Mo. LAB. REV. 694.

Three other New Deal laws contain provisions giving the Federal Government control of certain wage rates. Most likely to affect an unorganized, poorly paid group of workers is the Sugar Act of 1937.[35] Designed to aid sugar producers, the act none the less contains a clause forbidding benefit payments unless the producer "shall have paid wages therefore at rates not less than those that may be determined by the Secretary to be fair and reasonable after investigation and due notice and opportunity for a public hearing. . . ."

Likewise giving a federal agency the power to fix wages are the labor clauses of the amended Merchant Marine Act of 1936,[36] and the Civil Aeronautics Act of 1938.[37] The former provides that the United States Maritime Commission shall determine working rules for all types of vessels receiving an operating differential subsidy. The latter enacts into law a 1934 decision of the old National Labor Board which set a gradually increasing base rate of $1600 as annual wages and hourly rates at $4 an hour and up for all air line pilots.

From the early Utah law regulating hours of labor in the mines of the state, and the Massachusetts non-mandatory wage law, to the present labor standard laws of a state like New York has marked a real change in legislative feeling toward state interference in the labor contract. The federal interference in the field from the early days of President Van Buren's first decree to the days of the NRA and thence to the present wage-hour law has likewise seemed spectacular. Only a study of the intervening years indicates how gradually public opinion in general has shifted from *laissez faire* to collective action, and how organized labor, in the days of Gompers so opposed to state interference, has come to accept wage-fixing schemes such as the NRA as part of the economic scene.

[35] 50 STAT. 903, 7 U. S. C. §1131 (Supp. 1938).
[36] 52 STAT. 954 (1938), 46 U. S. C. §1131 (Supp. 1938).
[37] 52 STAT. 987 (1938), 49 U. S. C. §481(l) (Supp. 1938).

THE COVERAGE OF THE FAIR LABOR STANDARDS ACT AND OTHER PROBLEMS IN ITS INTERPRETATION

FRANK E. COOPER*

Broad responsibilities of statutory interpretation and administrative interpolation are imposed on the Wage and Hour Division of the Department of Labor in determining the coverage of the Fair Labor Standards Act of 1938. Two principal factors (interesting in themselves as examples of legislative technique) contribute to this end: first, use of elastic, vague, and broadly inclusive language in the provisions affirmatively establishing the coverage; second, delegation to an Administrator of the power to define the meaning of certain generic terms employed in those sections of the Act which establish exclusions and exemptions.

The result has been chiefly to generate doubts and uncertainty. But some cold comfort can be derived from the circumstance that at least one question as to the coverage of the Act can be answered with certainty. When an employer inquires whether the wage and hour requirements of the law apply to his business, an attorney can with comparative safety always answer in the negative. The fundamental inquiry in the determination of the coverage of the Act is not the nature of the employer's business, but the nature of the job of each employee. Many employers find that some of their employees are within the Act, while others are excluded.[1] If an employee is engaged in interstate commerce, or in a job which is necessary to the production[2] of goods for interstate commerce, he is entitled to the benefits of the Act, unless he falls within one of the exempted classes,[3] or unless his employer cannot constitutionally be compelled to grant him such benefits.[4]

In this article, an examination will be made of the content of the two phrases "engaged in commerce" and "engaged in the production [or in a process necessary to the production] of goods for commerce." A brief analysis of the several partial and

* A.B., 1931, J. D., 1934, University of Michigan. Member of the Detroit, Michigan, bar, associated with *Beaumont, Smith & Harris.* Contributor to legal periodicals.

[1] Why Congress in the enactment of this Act thus changed the usual test is a matter of considerable speculative interest. It seems likely, however, that the chief purpose was to avoid certain problems relative to the constitutional validity of the Act, and all such questions are excluded from the scope of this article.

[2] The Act employs primarily the phrase "engaged in production," but the Act further provides that an employee is deemed to be engaged in the production of goods if he is engaged in any process necessary to the production thereof.

[3] These are discussed in some detail, *infra,* pp. 343-350.

[4] Constitutional issues are discussed in a separate article in this symposium. For other discussions, see (1939) 52 HARV. L. REV. 645; Cooper, *"Extra Time for Overtime" Now Law* (1938) 37 MICH. L. REV. 28.

total exemptions will be undertaken; and reference will be had, finally, to certain practical problems centering around the terms "wage"[5] and "regular rate of pay"[6] in connection with the substantive requirement of the Act that covered employees be paid, for overtime work, at a rate not less than one and one-half times the regular rate of pay at which they are employed.[7] While any complete investigation of these problems necessarily would involve consideration of certain of the constitutional issues raised by the Act, these questions will not be here considered.

Broad though the powers of the Administrator are in determining the coverage, they are not so complete as was provided in some of the early drafts of the wage and hour bill,[8] under which the Administrator would have been empowered, first, to make investigations to determine which industries were so closely related to the flow of interstate commerce as to be subject to federal control and, secondly, to decide what the minimum wage and maximum hour requirements should be as to particular industries. Congress saw fit to reduce the scope of administrative freedom by limitations at once important and indefinite; and because of this, the implementation of the Act by the Administrator affords many interesting examples of the workings of the administrative process in filling in the interstices of a rather loosely knit legislative fabric.

Where power is delegated to the Administrator to make regulations (as in the section authorizing employment at substandard wages of learners, apprentices, messengers, and handicapped workers under certificates,[9] and in the section requiring the Administrator to define certain exempted classes[10]), he has published detailed rules closely conforming in style to legislative enactments. Where such power is not delegated, however, the Administrator has drawn on a variety of sources as a means of publicizing and seeking popular acceptance of his interpretation of ambiguous or obscure provisions of the Act.[11] A number of Interpretative Bulletins have been issued, drafted on the whole in persuasive rather than decretal language, interpreting sections of the Act which the Administrator does not have power to particularize through the medium of regulations.[12] Information dealing with less controversial questions as to coverage is disseminated through the medium of published Questions and Answers, designed to enable employers unskilled in reading legislative language to appreciate by example the meaning of many of the provisions of the Act and of regulations issued thereunder relating to coverage.[13] Finally, in opinions of counsel

[5] §3 (m). [6] §7 (a). [7] *Ibid.*

[8] See Forsythe, *Legislative History of the Fair Labor Standards Act, infra*, p. 464.

[9] §14. [10] §13.

[11] One of the features of the administration of the law has been the commendable effort to elicit popular co-operation.

[12] It should be noted that the Administrator has carefully pointed out, in published releases, that he has not been empowered to pass on the questions so discussed; and that the final answers are for the courts. The bulletins state what interpretation will be followed by the administrative officers unless the courts impose on them a different rule of practice or unless on reconsideration the administrative ruling is changed.

[13] These releases have been accompanied by the warning that each answer has been made on the basis of the particular circumstances involved, and that the answers should not be construed as covering cases that might be regarded as similar.

and public addresses, the administrative officials have sought to create a widespread acceptance of the liberal interpretation of the Act favored by the Administrator. References to illustrative instances of the employment of these techniques will be made hereinafter. They possess a distinct advantage in that, because of their semi-official nature, they can be used to suggest interpretations which, if issued in the form of regulations, might be invalid as going beyond the statute under which they were promulgated.[14]

I. EMPLOYEES ENGAGED IN INTERSTATE COMMERCE

Uncertainty as to the implications of recent Supreme Court decisions[15] renders doubtful predictions as to the comprehensiveness of the apparently simple phrase including within the provisions of the Act employees "engaged in commerce."[16] Certainly included are workers engaged in the operation of the instrumentalities of interstate commerce. The typical case would be members of a train crew, or wireless operators.[17] But what is to be said of the "back shop" employees—those who do not come into direct contact with the actual movement of commerce? A ready analogy is found in decisions construing the provisions of the Federal Employers' Liability Act,[18] under which only those employees who were engaged in interstate *transportation* were deemed to be included within similar language.[19] If the phrase "engaged in commerce" be again construed to mean "engaged in transportation," the problem would be greatly simplified; but since the decisions setting up this definition appear to be founded in part at least on doubts as to the constitutionality of including within the Federal Employers' Liability Act employees who were not engaged in transportation, and since later decisions go some distance toward erasing these doubts,[20] it may well be argued that in passing upon the Fair Labor Standards Act the courts will feel free to ignore this restrictive interpretation and hold that employees whose work is essential to the smooth operation of instrumentalities of commerce are themselves engaged in commerce, even though their contact with interstate movement of commodities or intelligence is only indirect. Conceding jural freedom to broaden the concept of the phrase "engaged in commerce," however, can it not properly be argued that Congress, in choosing to re-employ language which had been judicially con-

[14] For cases invalidating regulations of administrative agencies on this ground, see: Campbell v. Long & Co., 281 U. S. 610 (1930); Morrill v. Jones, 106 U. S. 466 (1882); United States v. Symonds, 120 U. S. 46 (1887); United States v. Eaton, 144 U. S. 677 (1892); United States v. United Verde Copper Co., 196 U. S. 207 (1905); United States v. George, 228 U. S. 14 (1913).

[15] Particularly Mulford v. Smith, 59 Sup. Ct. 648 (1939); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938); Santa Cruz Packing Co. v. National Labor Relations Board, 303 U. S. 453 (1938); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937).

[16] §§6(a), 7(a).

[17] Many such employees are exempted from the hours provisions by §13(b), referring to (a) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of §204 of the Motor Carrier Act, (b) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

[18] 35 STAT. 65 (1908), 45 U. S. C. §51 (1934).

[19] Shanks v. Delaware, L. & W. R. R., 239 U. S. 556 (1916); New York, N. H. & H. R. R. v. Bezue, 284 U. S. 415 (1932).

[20] See cases cited in (1939) 52 HARV. L. REV. 646, at 651, 652.

strued, must be held to have intended adoption of such construction? If Congress intended to include employees who would be excluded by defining "engaged in commerce" as "engaged in transportation," why did not the draftsmen provide that the Act should apply to all employees whose work "directly or substantially affects" commerce?[21]

Quite properly, all of these doubts have been resolved by the Administrator's general counsel in favor of a broad interpretation of the Act. As was stated in an early Interpretative Bulletin:[22]

"The first category of workers included,—those 'engaged in (interstate) commerce,' applies, typically but not exclusively, to employees in the telephone, telegraph, radio and transportation industries since these industries serve as the actual instrumentalities and channels of interstate commerce. Employees who are an essential part of the stream of interstate commerce are also included in the phrase 'engaged in commerce'; for example—employees of a warehouse whose storage facilities are used in the interstate distribution of goods."

The reference above made to the "stream-of-commerce" cases as authority for the inclusion of employees not directly engaged in interstate commerce is illustrative of the facility with which those charged with the administrative interpretation of the Act find support for broad interpretation thereof in somewhat unexpected sources. Similarly, the general counsel has suggested[23] that since a corporation is held not to be doing business within a state (so as to subject itself to the statutory penalties applicable to unlicensed foreign corporations) by installing in a factory therein mechanical equipment sold in an interstate transaction, it should follow that employees engaged in such installation are engaged in commerce, and not in a local activity. Since the decisions in question[24] are commonly referred to as being based on the theory that a state may not prohibit a local activity which is intimately associated with an interstate transaction, the opinion referred to may fairly be characterized as an interpretation that a worker engaged in local activity intimately associated with interstate commerce is *ipso facto* engaged in interstate commerce. A more comprehensive interpretation of the phrase could scarcely be desired by the most ardent champions of work-sharing.[25] On the other hand, the Administrator recognizes the dangers inherent in a ruthlessly logical application of a rule thus formulated, and concedes that employees whose direct contact with the actual movement of commerce is slight should perhaps be excluded from the operative effect of the Act for purely practical reasons.[26]

[21] It is on this theory that the federal power has been held to extend to at least some aspects of the activities of these "back shop" employees. Virginian Ry. v. System Federation No. 40, 300 U. S. 515 (1937).

[22] Wage & Hour Div., Interpr. Bull. No. 1, Oct. 12, 1938, 1 WAGE & HOUR REF. MAN. (1939) 72.

[23] Letter opinion, published in mimeographed form through the Wage and Hour Division's mailing list. (1939) 2 WAGE & HOUR REP. 11; *id.* at 72.

[24] *E.g.*, York Mfg. Co. v. Colley, 247 U. S. 21 (1918).

[25] It would seem that the effect of the Act is as much to encourage the sharing of work as to require payment of wages conformable to a desirable standard of living. See Cooper, *supra* note 4, at 31.

[26] In a mimeographed release, No. R-207, Feb. 28, 1939, published as a commentary on Interpretative Bulletins Nos. 5 and 6, it is stated: "This Division has not expressed any opinion as to whether any or all

It seems reasonably predictable that administrative interpretation will include within the category of employees "engaged in commerce" all those whose connection with interstate activities is sufficiently intimate that Congressional regulation of their employment can be validated under the doctrine that the federal power extends to local activities directly or substantially affecting commerce. It is not unlikely that this view may ultimately be judicially accepted.[27] Coverage will probably extend not only to those actually employed in interstate transportation or communication, but to extra-state purchasing agents,[28] to employees engaged in the actual unloading of goods received from other states,[29] at least where the continuity of shipment has not been broken by prolonged delay,[30] and possibly to other employees whose activities are closely connected with interstate transactions.

II. EMPLOYEES ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE

Most employees entitled to the benefits of the Act can claim rights thereunder because of their inclusion in the class of those "engaged in the production of goods for commerce." Consideration of the coverage of this clause can conveniently be divided into two inquiries: first, what employees are "engaged in production"; second, how is it to be determined whether the goods produced are "goods for commerce"?

A. Employees Engaged in Production

Suppose a candy manufacturing concern maintains a company car and employs a chauffeur who is paid thirty-five dollars a week and who is required to be on duty from eight until six o'clock five days a week to drive company officials on business calls. Is he engaged in the production of candy (and entitled to extra pay because he is on duty more than 44 hours a week)? The Wage and Hour Division would say "yes."[31] Whether this interpretation of the Act is correct involves one of the most important and difficult problems of statutory construction arising in connection with the Wage and Hour Law.

The difficulty arises by reason of the statutory definition of the word "produced," which is declared to mean[32] "produced, manufactured, mined, handled, or in any other manner worked on in any State" [note that each suggested synonym requires physical contact between employee and the article of manufacture] "and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in *any process or occupation necessary to the production thereof*, . . ."

---

of the employees of small telephone exchanges, which transmit interstate long distance calls very infrequently, are engaged in commerce." In Bulletins 5 and 6, the suggestions as to the meaning of this phrase were so broad as to imply that coverage of all switch board operators was assumed.

[27] See discussion, (1939) 52 HARV. L. REV. 645, at 653.

[28] Krueger v. Acme Fruit Co., 75 F. (2d) 67 (C. C. A. 5th, 1935).

[29] Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90 (1939).

[30] Lehigh Valley R. R. v. Barlow, 244 U. S. 183 (1917).

[31] See Interpr. Bull. No. 13, May 3, 1939, p. 3. [32] §3(j).

Were it not for the last phrase, italicized by the writer, the provisions of the Act would be applicable only to those workers actually handling the goods. The availability of this phrase, however, has enabled the Wage and Hours Division to take the position that substantially all employees of a plant which manufactures goods are themselves engaged in the production thereof. In an early Interpretative Bulletin,[33] it was declared, after quoting Section 3(j) of the Act:

"Therefore, the benefits of the statute are extended to such employees as maintenance workers, watchmen, clerks, stenographers, messengers, all of whom must be considered as engaged in processes or occupations 'necessary to the production' of the goods. Enterprises cannot operate without employees of these kinds. If they were not doing work 'necessary to the production' of the goods they would not be on the payroll."

The correctness of this interpretation of the law is open to serious doubts. Conceding that "enterprises cannot operate without employees of these kinds," does it follow that *production* could not proceed without such employees? It would seem not; and if it be true that production could proceed unimpaired even though the jobs of a company chauffeur (or, say, a clerk mailing out advertising matter) were eliminated, how can it be said that the chauffeur or the clerk are engaged in processes necessary to the *production* of the goods? The theory that all employees are doing work necessary to production because the enterprise could not be successfully operated without them contains elements of *non sequitur*.

More substantial objections can be raised to the propriety of this administrative interpretation of the Act. Since the statutory definition of "produced" requires physical contact with goods, and since the statutory description of "employees engaged in production" is stated subordinately to the definition of "produced," it can properly be suggested that the definition of "produced" is controlling, and that the significance of subsequent clauses in the same sentence[34] should be determined with reference to the introductory words. The second phrase of Section 3(j) should not be construed to enlarge the first; it is difficult to consider an employee to be "engaged in production" under this section unless his work is "production" as therein defined.

The inclusion within the phrase "engaged in production" of all employees engaged in an occupation necessary to production should be considered also with reference to court decisions apparently recognizing the distinction here suggested between processes necessary to the operation of an enterprise and those necessary to production.[35]

If the draftsmen of the Conference Committee intended, by shifting the criterion from the nature of the employer's business to the character of the work performed by an individual employee,[36] to find a new and broader basis for justifying federal

[33] Interpr. Bull. No. 1, Oct. 12, 1938, I WAGE & HOUR REF. MAN. (1939) 72.

[34] The definition of "engaged in production" appears in Section 3(j) is a posterior conjunctive clause in the sentence defining "produced."

[35] Maryland Casualty Co. v. W. C. Robertson Co., 194 S. W. 1140 (Tex. Civ. App. 1917); New Amsterdam Casualty Co. v. State Industrial Commission, 80 Okl. 7, 193 Pac. 974 (1920); Thurman v. Swisshelm, 36 F (2d) 350 (C. C. A. 7th, 1929); McMullin v. Bodine, 247 Pa. 151, 93 Atl. 321 (1915).

[36] Other statutes, of course, are based on the theory of the power of Congress to regulate employers whose enterprises substantially affect commerce. The words "production of goods for commerce" were

regulation of local activities,[37] it may be that an interpretation which in effect reverts to the nature of the employer's business will cut out from under the Act its supporting constitutional props.

It is also worth noting that somewhat similar language in the Walsh-Healey Act, which provides wage and hours standards as to employees of employers engaged in the performance of government contracts, has been contrarily interpreted by another Division of the Department of Labor, under which the Fair Labor Standards Act is administered.[38]

The importance of the problem is seen best by brief reference to its practical implications. Letters of inquiry and protest addressed to the Wage and Hours Division attest eloquently to the difficulty of paying time and a half for overtime to office workers employed on a weekly salary,[39] to watchmen,[40] and to other classes of non-productive workers paid a weekly salary for, say, a work-week of 45 hours.[41] So great, indeed, are the practical difficulties which have resulted from the Division's first sweeping pronouncement, that the matter is apparently being reconsidered by the Division, and some recession from its original position is not to be unexpected.[42]

While considerations of administrative convenience,[43] as well as the desire to at-

---

substituted in the Conference Report for the words "affecting commerce," which were used in the House amendment. 83 CONG. REC. 9246 (1938).

[37] It may be argued, for example, that the productive effort of any single worker has substantially the same effect on the flow of commerce regardless of the size of the plant in which he is employed, and that therefore minimum wages can be required for the benefit of a worker in a small plant doing chiefly an intra-state business, even though his employer's business, as such, is not subject to Congressional control. See Cooper, *supra* note 4, at 40, note 47.

[38] See Art. 102, Regulations Issued Pursuant to the Walsh-Healey Act. C. C. H. Lab. Law Serv. ¶¶7301.12, 7305.051. Comparable are the regulations issued under sales tax laws in various states defining the meaning of an exemption in favor of sales for consumption or use in industrial processing. The Michigan regulations, for example, provide (p. 8): "Manufacturing, producing, and processing are divided into three parts: 'administration,' 'production,' and 'distribution.' 'Administration' includes all administrative work such as general office work, all work relating to the administration of the business as a whole, and all work that is performed prior to the time of the commencement of the actual mechanical operations on the article to be manufactured, produced, or processed. 'Production' includes all operations performed in the actual process of producing the manufactured article. 'Distribution' includes all operations subsequent to production."

[39] These problems are discussed in some detail, *infra,* pp. 350-352.

[40] Who are customarily on duty a large number of hours per week, and whose wages, if increased pursuant to the over-time provisions of the law, would be disproportionately raised.

[41] So far as the writer has been able to discover from counselling members of the Michigan Manufacturers Association and from personal inquiry, little difficulty is met in paying productive workers time and a half for overtime—many plants have long operated on this basis; and in all sections of the country, the majority of productive workers receive wages above the statutory minimum. See Cooper, *supra* note 4, at 54-56.

[42] In a recent letter, distributed in mimeographed form, March 6, 1939, the Division stated: "We are not, at present, able to render an opinion on this question [whether a watchman, working at an operating plant but employed and paid by an insurance concern or watching service company] of coverage of the Act. This and related questions are under serious consideration. . . . In Interpretative Bulletin No. 1, p. 4 . . . we state our opinion to be that a watchman is engaged in the processes or occupations 'necessary to the production of goods' and is, therefore, covered by the Act. This statement may be qualified by our answer to your question above."

[43] If only employees performing work necessary to prevent stoppage of the actual productive processes are covered, the difficulty of drawing a line is seen by attempting to decide which of the following jobs are included, and which are excluded: stenographers, clerks in office, clerks in factory, inspectors who do

tain the broadest possible realization of the declared Congressional purpose, will doubtless induce the Wage and Hour Division to continue to urge a liberal interpretation of the phrase "engaged in processes necessary to production"; yet it appears that practical difficulties may induce the administration to concede certain relaxations of the broad rule originally urged; and it is not at all unlikely that court decisions may further restrict the effect of the phrase, to the end that eventually coverage may be limited to those employees who are actually on the production line, or are engaged in the performance of a job which must be done to keep the production line going.

B. Goods for Commerce

Employees engaged in processes necessary to the production of goods are entitled to the benefits of the Fair Labor Standards Act only if the goods produced are "goods for commerce." The extent to which this phrase will eventually be held to limit the coverage of the Act depends largely on questions of constitutional law beyond the scope of this article, and no more will be here undertaken than to suggest certain points at which constitutional limitations may reduce the effectiveness of the Act.[44]

1. Where Employer Sells Part of His Goods on An Interstate Market.

Current trends toward decentralization of industry make this classification probably the most inclusive.[45] By making the touchstone the nature of the work of the individual employee, Congress has extended the benefits of the Act to every employee whose work is connected with the production of *some* goods that move on an interstate market; regardless of the percentage of the goods manufactured in his employer's establishment that are so marketed. If the constitutionality of this test is established, the coverage will be much broader than under most federal laws enacted under the aegis of the commerce clause. Prior laws, referring to the direct effect of the employer's business as a whole on the flow of interstate commerce, excluded many plants whose interstate sales, constituting but a small percentage of the total output, were so small as to be insignificant, when viewing the nature of the employer's business.[46] By looking instead to the nature of the employee's work, the field in which the Act operates is vastly broadened. While the conclusion seems inescapable that the Act makes no distinction as to the percentage of the employer's products (or of the goods on which the employee works) that move in interstate

---

not touch articles, inspectors who do, superintendents, foremen, watchmen, power house operators, first aid attendants, tool crib men, truck drivers, equipment maintenance men, die try-out men, steamfitters, electricians, janitors.

[44] Constitutional issues are dealt with in the opinions of Messrs. Stern and Smethurst at pp. 433 and 444 *infra.*

[45] While no completely satisfactory statistics are available, it appears that even most parts manufacturers, who sell products that are later to become incorporated as a part of another article, number among their customers a substantial proportion who take shipments across state lines. It seems that most companies whose sales are exclusively intrastate supply but a single customer, who is so closely identified with the selling company that the two can be treated as one. *Cf.* National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937).

[46] This problem is more fully discussed, with reference to constitutional questions in my article, *supra* note 4, at 35-45.

commerce, the Administrator has buttressed his opinion to this effect by relying on the legislative history of the Act, the President's message advocating the passage of wage and hour legislation, the finding and declaration of policy in Section 2(a) (1) of the Act, and the reference to "any goods" in Section 15(a) (1).[47]

Of course, sometimes the destination of goods is not known until they have been sold. While administrative convenience would be best subserved by a rule that the residence of the ultimate consignee determined whether or not the goods were produced for commerce, yet this would produce unfair retroactive results—as in a case where an employer, at the time the goods were produced, expected to sell the entire output to a customer located within the same state, but later found it necessary to dispose of a part of his stock out of the state. Recognizing this situation, the Administrator has ruled that whether or not the goods are intended for commerce depends on whether the manufacturer at the time of production believes, or hopes, or has reason to believe that the goods in production will move in interstate commerce.[48] The unexpected occurrence of some subsequent event is not retroactively significant.[49]

2. Where Employer Sells All His Goods within the State to One Who Subsequently Effects Interstate Distribution.

Where the stoppage does not affect the character of the goods, it seems fairly predictable that the Act will be held to be validly applicable to the production of goods sold within the state of manufacture to a vendee who effects interstate distribution thereof, whether the stoppage of the goods in the hands of the first vendee be merely for reshipment or for storage.[50] Clear it is that the Administrator makes no distinctions based upon the length or character of the stoppage in the hands of the intermediate consignee; he states bluntly, "It is immaterial that the producer passes title to the purchaser within the State of production."[51]

Where, however, the goods produced by the first employer are subjected to further processing or manufacturing by the purchaser within the same State, constitutional questions of grave import are at once encountered.[52] The Administrator urges that

[47] Interpr. Bull. No. 5, Dec. 2, 1938, I WAGE & HOUR REF. MAN. (1939) 74, 75.

[48] *Id.*

[49] ". . . if a shirt manufacturer produces shirts to fill the order of a local retail store in the expectation that the shirts will be sold for consumption within the State of production, the manufacturer will not become retroactively subject to the Act in respect to those goods, because the retailer subsequently goes bankrupt and its whole stock of merchandise, including the shirts, is bought up by an out-of-State merchant and removed to another State. On the other hand, if the shirt manufacturer produced the goods to fill an out-of-State order, the rights of the employees under Sections 6 and 7 of the Act are not affected by the subsequent fact that a fire destroys the finished shirts before they are shipped out of the State." *Id.*

[50] Cases are discussed in (1939) 52 HARV. L. REV. 646, at 657.

[51] Interpr. Bull. No. 5, Dec. 2, 1938. It is interesting to note that in determining the applicability of state sales tax laws, the situs of the transfer of title is often made the controlling factor. See Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 HARV. L. REV. 617.

[52] Under the doctrine of the *Jones & Laughlin* decision it seems that further processing by a subsidiary of the original manufacturer does not create constitutional barriers. But in N. L. R. B. v. Idaho-Maryland Mines Co., 98 F. (2d) 129 (C. C. A. 9th, 1938), it was held that the Wagner Act did not apply to a strike at a coal mine where it appeared that all the gold there mined was refined by an independent purchaser before shipment out of the State. This appears to be the only case involving an independent intermediary under the National Labor Relations Act. *Quaere*, whether the persuasive power of this case is weakened by the decision in Mulford v. Smith, 59 Sup. Ct. 648 (1939).

the Act applies not only where the first product becomes an ingredient or an integral part of the subsequent product, but even where the first product is merely a container or label.[53] Whether the production of a label becomes "the making of goods for commerce" simply because the purchaser of the label subsequently affixes it to goods manufactured by him and sold in interstate commerce, would seem doubtful, however, even as a matter purely of statutory construction and independent of constitutional questions.

3. Definition of "Goods."

The problem last discussed lends significance to the problem of interpreting the statutory definition of *goods* as "wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof. . . ."[54] It seems clear to the Administrator that the term includes "publications, pamphlets, or any other written materials."[55] It would seem that a lawyer's brief, or an insurance policy, might be goods, if reports of research agencies are held to be, as suggested by the Administrator in the Interpretative Bulletin last cited. The ever-perplexing problem of the distinction between sales and service contracts may thus arise in a new setting. Coverage of the Act may be extended to non-manufacturing enterprises.[56]

4. Segregation of Employee's Work.

While the Act creates a presumption of an employee's engagement in the production of goods upon proof of his employment in a plant where goods shipped in commerce were produced,[57] the Administrator has voiced the opinion[58] that the Act does not require an employee who spends only a part of his time in the production of goods for commerce to be accorded the benefits of the statute during all the time that he works. If he works one week on goods destined for a local market, and the next week on goods for commerce, his employment is subject to the provisions of the Act only during the second week. But the Administrator does not permit segregation between interstate and intrastate work during a single week, for the reason that otherwise it would be easy to defeat the objectives of the Act by employing workers for 44 hours in the production of goods for commerce, and employing them for additional hours during the same work-week, in the production of goods to be sold locally, without increasing their rate of pay for the overtime hours.

III. EXEMPTIONS

While the clauses of the Act above discussed paved the way for administrative freedom of action by defining in flexible and broadly inclusive terms what groups

[53] Interpr. Bull. No. 5, Dec. 2, 1938.

[54] §3(i), adding: "but [the term] does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

[55] Interpr. Bull. No. 5, Dec. 2, 1938.

[56] Interpr. Bull. No. 6, Dec. 7, 1938, I WAGE & HOUR REF. MAN. (1939) 76. Some of the problems arising in connection with the exemption of service industries are discussed *infra* p. 349.

[57] §15(b).

[58] Questions and Answers, No. 9, Feb. 27, 1939, which warns that the Administrator has no power to make definite rulings as to the coverage of the Act and that no opinion expressed by him will protect the employer in the event of an employee suit.

of workers were covered by the Act, a similar result is achieved through an opposite technique in the exemption sections of the law. Here (except for some specific exemptions established in favor of certain well defined classes of employees), the Act in large measure delegates to the Administrator the power to decide what workers should be exempted. This result is achieved through a simple device. Section 13 of the Act declares that there shall be exempted from the provisions of the Act all employees of certain classifications, *as such classifications are defined by the Administrator.*

Examination of the exemption sections is therefore of interest from two aspects: first, because of the possibility (in view of the administrative interpretations above discussed) that substantially all employees of companies doing an interstate business are under the Act, unless they fall within one of the exempted classes; secondly, because the numerous regulations, interpretative bulletins, and letters published by the Wage and Hours Division of the Department of Labor afford a timely example of the administrative implementation of a somewhat barren statutory framework.

The exempting clauses of the Act may be divided into three classes: those granting exemptions only from the wage provisions of the Act; those granting exemptions only from the hours provisions; and those granting exemptions from both wage and hours provisions.

A. Exemptions from Wage Provisions

In the case of learners, apprentices, messengers, and handicapped workers, the Act provides an exemption only from the wage provisions. The applicable exempting clauses[59] are not self-operative; but merely authorize the Administrator, by regulations and orders, to provide lower wages for these classes of employees, if he finds such exemptions necessary to prevent curtailment of opportunities for employment. The exemptions become operative only upon the issuance of special certificates by the Administrator. Detailed and explicit regulations have been issued, which make the procurement of these certificates so difficult that during the first several months following the effective date of the Act, not a single certificate for the employment of learners or apprentices had been issued, although many applications had been filed.

Messengers and Learners. In the case of messengers and learners, the regulations[60] add significantly to the statutory background by providing that all applications will be considered and acted upon on the basis of the needs of the employees and employers in any industry as a whole, rather than upon the basis of the needs

[59] §14: "The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such periods as shall be fixed in such certificates."

[60] 29 CODE FED. REG., c. 5, Pts. 522, 523; I WAGE & HOUR REF. MAN. (1939) 83, 84.

of individual employees or employers in the industry.[61] The regulations further provide that on the filing of an application, a hearing will be had thereon, at which the Administrator or his representative will decide, on the basis of testimony offered by the applicant and that adduced by expert witnesses called by the Administrator to advise him as to the need of issuing a certificate to prevent curtailment of employment opportunities, whether or not an exemption shall be granted. While it might be feared that a judge who selects experts to advise him as to the facts of a case might be disposed to rely too heavily on the opinions they give, the practical advisability of such a procedure, to prevent the hearing on the application from being one-sided and in effect *ex parte,* is quite apparent. It should be noted, however, that there is no provision for appeal as of right to the Administrator from the decisions of the deputy who conducts the hearing. The regulations permit an aggrieved applicant to petition the Administrator, requesting him to review the original determination; but the Administrator may refuse to grant such petition for any reason he deems sufficient, as if he is of the opinion that the findings of ultimate fact made by the deputy support the ruling, and are supported by the evidence adduced.

Indicative of the administrative attitude are the rulings made on the application of a group of telegraph companies for messengers' certificates, and on the application of pecan shellers for learners' certificates. In the former case, it was indicated that a threatened discharge of employees of a particular company or companies will not establish that a certificate is necessary in order to prevent curtailment of opportunities for employment, unless the applicant shows that the employees involved would be unable to secure other employment elsewhere.[62] In the latter case, exemptions were denied because of a finding that the employers could employ experienced pecan shellers in sufficient numbers to meet labor requirements.[63] The implications of such rulings, placing as they do upon the applicant a burden of proof which as a practical matter is probably impossible to sustain, are portentous. They will probably discourage employers from seeking exemptions, and thus, in actual practice, will extend the effective coverage of the Act. Perhaps these considerations played some imponderable part in the making of the administrative decisions.

Apprentices. A somewhat different approach is employed with reference to the issuance of apprentices' certificates, which are issued (providing the Administrator finds an apprenticeship is necessary in the trade involved) upon the filing of a joint application, signed by both employer and employee, together with an authenticated copy of a written apprenticeship agreement which has been approved by the State Apprenticeship Council, and which provides for not less than 4,000 hours of reasonably continuous employment, and at least 144 hours per year of related supplemental instruction.[64]

[61] Within the last few days, however, it has been announced that henceforth granting of exemptions for learners will be on a plant basis. (1939) 2 WAGE & HOUR REP. 261. New regulations concerning learners are being promulgated currently.

[62] (1938) 3 LAB. REL. REP. 377.

[63] I WAGE & HOUR REF. MAN. (1939) 84.

[64] 29 CODE FED. REG., c. 5, Pt. 521; I WAGE & HOUR REF. MAN. (1939) 81.

Handicapped Workers. Similarly, in case of handicapped workers, the regulations provide that upon receipt of a joint application setting forth in detail the nature of the handicap and the necessity of authorization of employment at sub-minimum wages to prevent curtailment of the employee's opportunities for employment, the Administrator or his representative may award a certificate or make a further investigation to determine what action should be taken. It is further provided that, except on the basis of such investigation, no certificate will be issued authorizing employment of handicapped workers at less than 75% of the statutory minimum wage.[65]

Messengers, learners, apprentices, and handicapped workers must be paid at one and a half times their regular hourly rate of pay for overtime work performed by them; the exemption granted them applies only to authorization of a sub-standard hourly rate.

B. Exemptions from Hours Provisions

Another group of exemptions grant immunity only from the hours provisions of the statute. In case of seasonal workers, some agricultural processors, employees whose hours of service are controlled by the Interstate Commerce Commission, employees under approved annual wage agreements, and employees hired under approved collective bargaining agreements containing certain provisions relative to hours worked, the exemptions afforded under the law authorize employment in excess of 44 hours per week without payment of one and a half the regular hourly rate of pay for such overtime employment.

Seasonal Industries. The exemption for workers in seasonal industries is limited in two ways: first, it is applicable only to workers in an industry which is found by the Administrator to be of a seasonal nature (thus, under the plain language of the statute, a finding by the Administrator is a condition precedent to the effectiveness of the exemption); second, as to such workers, the exemption is applicable only for periods not to exceed in the aggregate 14 weeks in any calendar year, and even during the 14 weeks they must be paid time and a half for employment in excess of 12 hours in any work-day, or for employment in excess of 56 hours in any work-week.[66]

The regulations[67] define a seasonal industry in terms which exclude any enterprise that is not compelled by conditions of nature to cease production except during periodically recurrent intervals,[68] and thus seem to exclude all manufacturing industries, or substantially all. The Division has further indicated, through its general counsel, that no single plant will be exempted even though it meets the definition of

[65] 29 CODE FED. REG., c. 5, Pt. 524; I WAGE & HOUR REF. MAN. (1939) 90.

[66] §7(b).

[67] 29 CODE FED. REG., c. 5, Pt. 526; I WAGE & HOUR REF. MAN. (1939) 54.

[68] The regulations provide that the exemption is applicable to "an industry which both (a) engages in the handling, extracting, or processing of materials during a season or seasons occurring in a regularly, annually recurring part or parts of the year; and (b) ceases production, apart from such work as maintenance, repair, clerical and sales work, in the remainder of the year because of the fact that, owing to climate or other natural conditions, the materials handled, extracted, or processed, in the form in which such materials are handled, extracted, or processed, are not available in the remainder of the year." I WAGE & HOUR REF. MAN. (1939) 55.

"seasonal" as laid down by the Administrator. The exemption is granted only on the basis of trades and industries that are seasonal.[69]

Further restrictions on this exemption were indicated by the ruling on an application of certain lumber manufacturers. Despite a showing that the operations of cutting, hauling, and pulpwood peeling were carried on under conditions which met the administrative definition of *seasonal*, it was held that these enterprises did not constitute separate industries, but were (regardless of unit ownership) merely subdivisions of the lumbering industry, which, taken as a whole, could operate throughout the year. Therefore, and with the additional observation that enough employees were available for work to permit operation of the industry even though the exemption were not granted, the application was denied.[70]

Collective Bargaining Agreements. The provisions of Sections 7(b) 1 and 7(b) 2 of the Act, granting limited exemptions as to workers employed under certain types of collective bargaining agreements, or annual wage agreements, can be discussed together. An employer who hires workers on an annual basis, or on the basis of a contract relating to a 26-week period, pursuant to collective bargaining agreements made with employee representatives certified as bona fide by the National Labor Relations Board, may obtain the right to average overtime over a period of time. If such agreements provide that no employee shall be employed more than 2,000 hours in 52 consecutive weeks, or 1,000 hours in 26 consecutive weeks, an employee may be required to work up to 12 hours in one day or 56 hours in one week, without payment of extra compensation for the overtime hours. These provisions may lead to wider use of guaranteed annual wage contracts, since the Administrator has ruled that the statutory exemption applicable to employees hired on an annual basis may be availed of only if the employer guarantees either a fixed annual wage or annual employment.[71] On the other hand, where the worker is employed pursuant to an agreement which provides that no employee shall be employed more than 1,000 hours in any priod of 26 consecutive weeks, the employer need not guarantee continuous employment or a fixed wage; and this type of agreement may be more attractive to employers.[72] The National Labor Relations Board will certify the employee representative group as bona fide if any other local of the same union has already been certified as a collective bargaining agent under the National Labor Relations Act, unless cause to the contrary is shown.[73] Adoption of either of these devices will

[69] *Id.* at 57.

[70] The 12-page typewritten opinion in which this ruling was laid down proceeds with the closely-reasoned formality of a judicial decision. The Wage and Hour Division appears to break cleanly away from the often-criticized tendency of administrative tribunals to keep secret the reasons for their orders.

Since the writing of the text, the Administrator on reviewing this determination, reversed it to the extent of holding that the pulp wood sap peeling branch of the industry, the ice and snow road hauling branch of the industry, and the spring freshet driving branch of the industry are of a seasonal nature.

[71] Interpr. Bull. No. 8, Feb. 20, 1939, I WAGE & HOUR REF. MAN. (1939) 205.

[72] *Id.*

[73] The National Labor Relations Board has stated that an employee organization will be certified as bona fide, for purposes of the Fair Labor Standards Act, under the following circumstances: (1) where the labor organization has been certified by the Board as a collective bargaining representative of the employees pursuant to §9 of the National Labor Relations Act; or (2) where the applicant is a local

necessitate careful watching of employees' time cards, because the Administrator has ruled that if the employer works such employees in excess of 1,000 or 2,000 hours, during the period stated, he will become liable for overtime compensation (at extra rates) to such employees for all hours which they worked in excess of 44 hours in any work-week during the period.[74]

Agricultural Processors. The hours exemption granted certain agricultural processors[75] raises difficult administrative problems, which are still far from solution, in connection with the administrative duty of defining "area of production."[76] Otherwise, the statutory provisions appear to provide little source of interpretative difficulty.

Hours Fixed by Interstate Commerce Commission. The final exemption from the requirement of paying increased compensation for overtime work applies (1) to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act; and (2) to any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.[77]

C. Exemptions from Wage and Hours Provisions

The most important exemptive provisions of the Act are those granting complete exemption to the following twelve classes of workers: (a) executive and administrative employees, as the class is defined and limited by the Administrator; (b) professional employees, as the class is defined and limited by the Administrator; (c) outside salesmen, as the class is defined and limited by the Administrator; (d) employees engaged in a local retailing capacity, as the class is defined and limited by the Administrator; (e) employees of retail and service establishments, the greater part of whose selling or servicing is in intrastate commerce; (f) certain aviators; (g) seamen; (h) fishermen; (i) employees engaged in agriculture; (j) employees engaged, within the area of production (as defined by the Administrator) in preparing for

---

of an international or parent organization which has been certified by the Board as a collective bargaining representative of the employees pursuant to §9 of the National Labor Relations Act; or (3) where any local of an international or parent organization with which the applicant is affiliated has been so certified as a collective bargaining representative pursuant to the National Labor Relations Act, such certification shall be sufficient basis for certification of bona fides under the Fair Labor Standards Act, for any local of the same international. I WAGE & HOUR REF. MAN. (1939) 57.

[74] Interpr. Bull. No. 8, Feb. 20, 1939, I WAGE & HOUR REF. MAN. (1939) 205.

[75] §7(c) of the Act, providing: "In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

[76] The regulations on this point are undergoing current study by the Administrator; the treatment of the problem appears to be in a state of flux. See various regulations, I WAGE & HOUR REF. MAN. (1939) 11, 79, 81, 193.

[77] §13(b).

market agricultural or horticultural commodities; (k) employees of certain country newspapers; (l) employees of street railways and motor bus carriers.

Executive and Administrative Workers. Regulations under the Walsh-Healey Act afforded some grounds for anticipating that all employees might be deemed executive or administrative workers whose chief function was to give, or to supervise the carrying out of, general orders. Such expectations failed completely of realization. The Administrator has ruled that under the Fair Labor Standards Act, only those employees fall within this class whose jobs possess all of the following six characteristics: (1) management of establishment or customarily recognized department thereof; (2) direction of work of other employees; (3) authority to hire and fire, or to make recommendations carrying particular weight in these matters; (4) exercise of discretionary powers; (5) compensation of at least $30 a week (exclusive of board, lodging, or other facilities); (6) performance of no substantial amount of work of the same nature as that performed by non-exempt employees.[78] The last requirement has proved particularly troublesome to employers, since many employees who have traditionally been deemed minor executives do a certain amount of work somewhat similar in nature to that performed by their assistants—a corporation treasurer, for example, may set up work sheets as models for bookkeepers to follow. For administrative convenience, perhaps, and perhaps in compliance with a clearly indicated administrative policy of going half-way in meeting and satisfying reasonable complaints of employer groups, the Division (according to press reports) may change the regulations on this point so as to define as "executive or administrative" any salaried employee receiving more than $350 per month. Such action may be dictated by Congress; several amendments are pending.[79]

Professional Employees. Possibilities that a color-matcher employed in the printing ink industry might be a professional employee, and that conceivably a doctor or attorney might not be, loom as the result of the somewhat puzzling definition of the term "professional employee" promulgated by the Administrator pursuant to statutory authority.[80] It would seem that perhaps a physician employed solely to examine life insurance applicants, or an attorney employed to check transfers of

[78] I WAGE & HOUR REF. MAN. (1939) 78.

[79] It would seem that in the case of employees being paid such a salary for the performance of non-manual work, the employees are paid for their ability to handle situations as they arise. Many such workers have a comparatively light load for several weeks, and then face a situation which requires considerable overtime work for several days, in order to keep things flowing smoothly; and it is fair to assume that their salary is fixed in part at least in the expectation of such a work schedule.

[80] The regulations provide that a professional employee is one: "who is (a) customarily and regularly engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work, and (ii) requiring the consistent exercise of discretion and judgment both as to the manner and time of performance, as opposed to work subject to active direction and supervision, and (iii) of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and (iv) based upon educational training in a specially organized body of knowledge as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, mechanical, or physical processes in accordance with a previously indicated or standardized formula, plan or procedure; and (b) who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer." I WAGE & HOUR REF. MAN. (1939) 194.

property in a register of deeds' office, might not fall within the requirements of the definition, providing in part that professional work must be varied in character, requiring judgment as to the time of performance, and of such a nature that the output produced cannot be standardized in relation to a given period of time. On the other hand, the Administrator recently advised that the color-matcher might be a professional employee.[81]

Outside Salesmen. Vendors of food-stuffs, who make recurrent routine deliveries (whether or not prior orders are placed by purchasers) or collections, are specifically excluded from this exempt classification by the administrative definition, which otherwise requires but little comment, providing as it does that outside salesmen are those customarily and regularly engaged in making sales away from the employer's place of business, who do no substantial amount of work of the same nature as that performed by non-exempt employees of the employer.[82]

Those Engaged in Local Retailing Capacity; Employees of Retail and Service Establishments the Greater Part of Whose Selling or Servicing is in Intrastate Commerce. While these sections, taken together, cover closely related fields, yet Congress empowered the Administrator to define only the meaning of the first clause, "employees engaged in a local retailing capacity."[83] The meaning of "any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce"[84] is left to the courts for definition. The result may be a conflict. The Administrator has defined the first class to include workers customarily and regularly engaged in making retail sales the greater part of which are in intrastate commerce, or performing work immediately incidental thereto, such as the wrapping or delivery of packages, who do no substantial amount of work of the same nature as that performed by nonexempt employees of the employer.[85] The Administrator has made his definition more specific through an Interpretative Bulletin suggesting a construction of the words "retail" and "service" establishments. While his interpretation of the word "retail" is apparently binding as to employees engaged in a local retailing capacity, it may be that the courts will interpret the same word otherwise in determining whether an enterprise is a retail establishment. In an Interpretative Bulletin[86] relating to the meaning of the phrase "retail and service establishments," it is suggested that retail establishments generally sell consumers goods in small quantities, and that a company selling coal in large quantities to a manufacturer would not be a retail establishment, while a company selling a few tons of coal to a householder would be. It is further suggested in the Interpretative Bulletin that since retail establishments and service establishments are referred to in the same sentence of the Act, the definition of service establishments should be limited to concerns of a sort generally associated with retail stores, such as restaurants and barber shops; and that such enterprises as advertising agencies, banks, stock brokers, printers, investment

[81] Questions and Answers No. 9, Feb. 27, 1939.
[82] I WAGE & HOUR REF. MAN. (1939) 79.
[83] §13(a).
[84] *Ibid.*
[85] I WAGE & HOUR REF. MAN. 79.
[86] Interpr. Bull. No. 6, Dec. 7, 1938; I WAGE & HOUR REF. MAN. (1939) 76.

counsel, legal firms, accounting firms, and warehouse companies are not service establishments. Apparently for purposes of administrative convenience, it is suggested that in case of an organization engaging both in wholesale and retail selling, there must be some physical separation between the wholesale and retail branches of the business if the exemption is to apply. In determining whether or not the greater part of the selling or servicing is in intrastate commerce, the Administrator suggests that there should be considered the number of sales and gross income over a reasonable period of time, typically three years.

Other Exempted Classes. Little comment is required with reference to the other exempted classes of employees. The statutory definitions are comparatively specific, and there is less delegation to the Administrator of power to write the law by determining the limits of the classes involved. The exemption of seamen has been interpreted[87] as including those performing services rendered primarily as an aid in the operation of a vessel as a means of transportation. The exemption for workers employed in agriculture is pointed by the definition of farming (given elsewhere in the Act)[88] as including any practices performed on a farm in conjunction with farming operations. Apparently, maintenance workers and watchmen employed on farms are exempted,[89] although workers performing similar jobs in factories (as above pointed out) are deemed by the Administrator not to be excluded, but to be within the Act. The exemptions of individuals employed within the area of production engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in the making of cheese or butter or other dairy products,[90] creates the extremely difficult administrative problem, hereinabove alluded to, of devising a practicable definition of "area of production." Other exemptions exclude from the Act any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act, employees engaged in various specifically defined branches of the fishing industry, employees of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier; and employees engaged in connection with the publication of a weekly or semi-weekly newspaper with a circulation of less than 3,000, the major part of which circulation is within the county where the newspaper is printed and published.[91]

IV. Determination of Hours Worked and Hourly Rate of Pay

Practical problems of considerable difficulty arise in connection with the determination of the number of hours worked and with the computation of the hourly rate of pay. The Act was written with primary reference to hourly-wage employees; but as it has been administratively interpreted it applies to many office workers who have customarily been employed on a weekly or monthly salary which has been paid without regard to the number of hours actually worked.

[87] Interpr. Bull. No. 11, April 29, 1939.
[88] §3(f).
[89] Questions and Answers, I WAGE & HOUR REF. MAN. (1939) 96.
[90] §13(a) 10.
[91] §13.

Many employers who hire employees on a weekly wage and require them occasionally to work more than 44 hours during a single week wish to adopt the most practical and cheapest procedure available to assure themselves that they are complying with the Act and with all the regulations issued thereunder.[92]

Such an employer often faces the problem of revising his pay-rolls so as to achieve unquestionable compliance with the Act without prohibitive increases in his wage costs. Suppose he hires several employees who are paid $40 for a 50-hour week. Each such employee gets the equivalent of 80 cents an hour; his weekly remuneration is far above the minimum contemplated by the Act (which will eventually be 40 cents an hour for the first 40 hours and 60 cents an hour for additional hours of work in any week). It would seem that the primary purpose of the Act could be fulfilled by continuing such an employee on the payroll at his weekly wage of $40.[93] This was the interpretation which apparently was first placed upon the Act by the Administration —in October, 1938, Associated Press articles quoted authorities as announcing unofficially that a worker employed on a flat weekly salary might be worked more than 44 hours a week without increased pay, provided his total earnings were not below the minimum requirements of the law.[94] More recently, however, it has been officially ruled that this cannot be done. The regulations require time-and-a-half for overtime, regardless of the rate of pay or basis on which wages are computed. An employee receiving $40 for a 50 hour week would be deemed to be paid at the rate of 80 cents an hour, and the regulations require that his weekly wage be increased to $42.40 ($.80 x 44 plus $1.20 x 6).[95]

It would seem that the most practical expedient for the employer is to change such

[92] Indicative either of a general acceptance of the purposes of the Wage and Hour Law, or possibly of a resignation to federal control of business practices, is the fact that employers with whom the writer has had contact have expressed a desire to comply in all respects with the statute; and, even though grave doubts existed as to applicability of provisions of the Act to certain of their employees, have treated all of their employees as being subject thereto.

[93] This, of course, raises the broad question as to what the real purpose of the Act is. While the Congressional declaration of policy in Section 2 declares the policy of the Act to be that of correcting and eliminating labor conditions detrimental to the maintenance of minimum standards of living necessary for health, efficiency, and general well-being of workers, many believe that an equally fundamental purpose of the Act is to induce work-sharing. While the latter may be a practical concomitant of the Act, it would seem that the officially announced purpose may properly be regarded as the true intent of the legislation.

[94] Much interchange of opinion and comment has been indulged in this connection. On Sept. 29, 1938, the Administrator is reported to have stated, in reply to a question asked at the conclusion of a speech given by him in Birmingham, Ala., that a minimum wage law is the floor of the very lowest wage to be pegged, and that the law did not contemplate establishment of several minimum wages within a single plant. Associated Press releases of Oct. 20, 1938, stated in part: "This is the unofficial advice which some wage-hour authorities have given in response to inquiries: . . . A worker now employed on a flat weekly salary might be worked overtime without increased total pay by regarding his hourly rate as being at a lower figure." John C. Gall, General Counsel for the National Association of Manufacturers, issued an opinion which in general reached a somewhat similar result. I WAGE & HOUR REF. MAN. (1939) 59, 60. The Administrator replied, stating that the Wage and Hour Division did not agree with Mr. Gall's opinion. *Id.* at 60, 61. The subject is discussed in an editorial in the *New York Times* of Tuesday, Oct. 25, 1938.

[95] Similarly, the average hourly rate of a piece-worker is computed by dividing his piece-rate earnings for a week by the number of hours worked during the week, and then paying a bonus for those hours in excess of 44. 29 CODE FED. REG., c. 5, Pt. 516; I WAGE & HOUR REF. MAN. (1939) 105; Interpr. Bull. No. 4, Oct. 21, 1938, I WAGE & HOUR REF. MAN. (1939) 54.

employee's basis of pay to 76 cents an hour. Then, paying time-and-a-half for overtime, his total weekly earnings (if he worked 50 hours) would be $40.28 ($.76 x 44 plus $1.14 x 6) or approximately the same as they had been under the original flat weekly rate.

While counsel for the Wage and Hours Division have warned that this practice is not authorized by the Act,[96] the writer submits that it is not prohibited by the Act; and, further, that it complies both with the letter and with the spirit of the law. True, Section 18 provides in part that, "No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act"; but the wishful language of this section (which was at one time termed by the Administrator to be nothing more than a "pious hope" on the part of Congress) by its own terms applies only to *reductions* of wages. It does not refer to changing the *method* by which wages are computed. The procedure suggested does not result in a reduction of wages—the employee receives the same weekly wage as before, if he does the same amount of work. Indeed, in the example given, the employee's wages are increased 28 cents a week. Further, the essential legislative purpose—assuring a living wage for a short week's work—is not defeated. If the employee referred to wished to work only 44 hours a week, he would still receive $33.44.

V. CONCLUSION

Perhaps the chief practical defect in the coverage provisions of the Act is that because of constitutional limitations the law can have no application to thousands of employees (in retail stores, barber shops, restaurants, hotels, other retail and service establishments, and small factories operating exclusively intra-state) who probably constitute the largest class of underpaid workers.[97] There is a real need for further state laws, requiring payment of a fair day's wages for a fair day's work, and restricting or prohibiting employment in excess of the maximum number of hours consistent with health and efficiency.[98]

[96] See excerpts from speeches, I WAGE & HOUR REF. MAN. (1939) 62, 63; *cf.* Interpr. Bull. No. 4, Oct. 21, 1938, I WAGE & HOUR REF. MAN. (1939) 54.

[97] This situation is discussed in some detail in the writer's article cited, *supra* note 4, at 54 *et. seq.*

[98] These ends can of course be achieved by laws that do not incorporate the work-sharing philosophy inherent in the Federal Act. Prohibition of employment more than an average of nine hours a day or 54 hours a week in certain industries, and a minimum rate of pay of 25 cents to 35 cents an hour, without retention of the device of requiring extra pay for hours worked in excess of a minimum devised otherwise than on health-conservation principles, would accomplish the declared purpose of Congress.

THE ORGANIZATION AND FUNCTIONING OF INDUSTRY COMMITTEES UNDER THE FAIR LABOR STANDARDS ACT

Z. Clark Dickinson*

The industry committees appointed by the Administrator under the Fair Labor Standards Act, giving equal representation to employers, workers, and the public with reference to each industry, are somewhat analogous to the wage or trade boards utilized by previous minimum wage legislation, in the American states and abroad. The former, however, are likely to become more numerous than the latter have been in any one state or nation; and it is not yet apparent whether they are destined to play as active and sustained a role in administration as have some minimum wage boards here and abroad. By the middle of June, 1939 only seven industry committees had been appointed, most of them since January 1, 1939. Committee No. 1, appointed in the early autumn of 1938, was designated the Textile Committee; the Apparel Committee (No. 2) was appointed later in 1938. Early in January, 1939 (at the suggestion of members of Committee No. 1) the textile field was divided, and Committee No. 1-A was established to have jurisdiction over establishments using wool and other animal fibers, except silk. The other committees thus far appointed are No. 3, Hosiery, No. 4, Hats, No. 5, Millinery, and No. 6, Boots and Shoes. Each of these committees has been collecting evidence concerning its own industry for the purpose of assisting the Administrator in "reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour. . . ."

By early May three of the committees had agreed upon recommendations: cotton, 32½ cents; wool, 36 cents; seamless hosiery, 32½ cents; full-fashioned hosiery, 40 cents; but the division of jurisdiction as between the cotton and woolen industries remained to be cleared up. The Textile and Woolen industry committees met concurrently in Washington on May 22. They were unable to agree on consistent definitions of their respective industries; hence the Administrator was obliged to issue an order on such demarcation. He chose substantially the lines followed by the NRA codes, *viz;* fabrics of not more than 25 per cent wool content (by weight) to conform to the cotton textile minimum wage regulations, those over 25 per cent, to the woolen industry's minimum wage. Committee No. 1 thereupon completed its recommenda-

* A.B., 1914, University of Nebraska; Ph. D., 1920, Harvard University. Professor of Economics, University of Michigan. Member, Woolen Industry Committee, No. 1-A.

tion of a 32½ cent minimum wage for the textile industry with an opposing minority report; and Committee 1-A renewed its recommendation of 36 cents. The Woolen Committee was disappointed that fabrics of lower than 25 per cent wool should not be subject to the woolen industry's minimum wage. The lower this breaking-point is made (with differing wage rates), the greater the protection of the woolen industry against the manufacture of blends of wool, cotton, and rayon, which have developed rapidly since NRA days.

By the first of June public hearings on recommendations had not yet begun.[1] This deliberate pace, so sharply in contrast with NRA action, suggests more thorough and careful work; and, since the blanket minimum for all industries under the Act is advanced from 25 to 30 cents at the end of the first year, there has not been very urgent need for greater speed. In 1940-45, however, while this blanket minimum remains at 30 cents, it is extremely important that many industry committees be activated to push up the minimum to 40 cents as gradually as may be needful.

The nature and work of these committees, so far as can be judged from a very limited contact with the limited experience thus far available, will be developed in this article by discussion of (i) the chief features concerning the committees, in the law and in the Administrator's regulations[2] and practices, with reference to the scope and personnel of the committees; (ii) their functions, procedures, and problems; and (iii) some inferences as to their general significance in the administration of the Act. A few suggestions will be ventured as to how the committee scheme might be improved.

I. SCOPE AND PERSONNEL OF COMMITTEES

The principal mandates in the Fair Labor Standards Act with specific reference to industry committees are contained in Sections 5, 8, and 9. Section 5 reads as follows:

> Sec. 5. *Industry Committees.* (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in [interstate] commerce or in the production of goods for [such] commerce.
>
> "(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.
>
> "(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its

[1] Hearings on the recommendation of the Textile Committee were set for June 19 in Washington and July 26 in Atlanta.

[2] The Administrator's *Regulations Applicable to Industry Committees, Pursuant to Section 5 of the Fair Labor Standards Act of 1938* (29 CODE FED. REG. c. 5, Pt. 511, November, 1938) may be consulted with reference to any points in the following discussion of legal powers and rules of these committees which may not be clear by reference merely to the statute. See the issues of the *Wage and Hour Reporter* for many factual particulars, including releases from the Administrator's office.

members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

"(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations."

It will be observed that the Administrator is required to appoint such a committee for each "industry" of interstate significance, but no instruction is contained in the law as to how such industries may be defined. He also has full discretion as to the order in which the industry committees shall be appointed. It is much easier to define industries now than it would have been 20 years ago, of course, by reason of the growth of labor and trade organizations, particularly since inception of the NRA. The Administrator has appointed the industry committees named above, with the objective of dealing first with the larger bodies of low-paid workers; and it seems unlikely that demands will appear for anywhere near as many categories as were implied by the 500-odd codes of NRA.[3]

Numerous puzzles are encountered, however, in the search for demarcations between even the older and larger industries, for purposes of industry committee organization—particularly if the minimum wage rates are set differently for overlapping operations. Thus, as stated above, there was sufficient demand to lead the Administrator to set up Committee 1-A for woolen and worsted textile establishments; and the duty was laid upon Committees 1 and 1-A, through their subcommittees, to assist in determining to which establishments and/or departments their respective recommendations should apply. Many mills produce mixtures and blends of cotton, woolen, and other fibers, *e.g.*, in blankets. Under NRA the higher minimum wage of the woolen code applied to all departments using 25 per cent or more of wool. In appointing each industry committee the Administrator commonly specifies a number of subindustries which are definitely included, but this demarcation usually has to be worked out further—for example, as to whether carpets and rugs made largely of wool should be covered by the woolen industry's minimum wage.

It will be noticed, by reference to subsection (b) of Section 5, quoted above, that each committee is to be composed of equal numbers of representatives of the public,

[3] *Cf. Naming Industry Committees* (1939) 2 WAGE & HOUR REP. 141. According to this article, first to be named are committees for industries in which minimum hourly rates of from 30 to 40 cents (the blanket rate for all industries covered will be automatically raised to 30 cents in October 1939) will not substantially curtail employment, yet will correct material numbers of unduly low rates. Those industries in which few earnings, if any, are now below 40 cents, will doubtless be last to be provided with industry committees. Among proposals under discussion in Congress, for amendment of this Act, is one for a separate industry committee to deal with very low wages in Puerto Rico and the Virgin Islands.

the employees, and the employers; and that such representatives are to be appointed "with due regard to the geographical regions." Apart from these somewhat elastic directions the Administrator has full discretion. Naturally in choosing employer and labor members he attaches much weight to suggestions from the trade and labor organizations most directly concerned. Trade association executives have not been appointed as employer representatives; trade union executives have been so appointed. Choice of public representatives has been more puzzling. The Administrator has made a sincere and able effort to select these public members on the basis of merit, but merit for this rather novel function is an elusive factor. In some cases the public members are retail merchants, who are unusually conversant with technical details of the product and with the consumer's interest in its wage costs. Another main source of public members is the teaching profession.

Most of the committees thus far appointed are so large as to be rather unwieldy, and, in the aggregate, to become a bit of a drain on the funds available for the Act's administration.[4] A chief reason for these numbers is the corresponding number of subdivisions within the industries, in each of which employers have desired representation. To some extent the total number of committeemen is kept down, and experience kept up, by overlapping appointments—identical persons representing the public and labor serving on two or more industry committees.

II. FUNCTIONS, PROCEDURES, PROBLEMS

From the foregoing review of conditions surrounding the appointment of an industry committee, we may pass to consideration of its functions, duties, and powers. The legislative mandates on these matters are found in Sections 8 and 9 of the Act. Section 9, pertaining to attendance of witnesses and summoning of books, papers, and documents, confers on the industry committees subpoena power in accordance with the Federal Trade Commission Act.[5]

Section 8, entitled "Wage Orders," is too lengthy to be quoted here as a unit, but several of its parts must be examined rather closely. Subsections (a) and (b) read as follows:

"(a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in [interstate] commerce or in the production of goods for [such] commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6. . . .

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The

[4] The numbers of persons on these committees are as follows: No. 1, Textiles, 21 members; No. 1-A, Wool and Worsted, 15 members; No. 2, Apparel, 48 members; No. 3, Hosiery, 15 members; No. 4, Hats, 15 members; No. 5, Millinery, 15 members; and No. 6, Boot and Shoe, 27 members. Members receive $15 a day for service, beside subsistence and travel expense. All the full committee meetings have thus far been held in Washington; a few subcommittees have met elsewhere.

[5] See Herman, *The Administration and Enforcement of the Fair Labor Standards Act, infra,* p. 368. notes 99-101.

industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry."

These paragraphs indicate that the industry committee's function is limited to investigation and recommendation to the Administrator of what the committee, after due deliberation, considers the highest minimum wage rate (not over 40 cents per hour) which its industry can then stand.[6] The limits, therefore, within which such recommendations fall are the blanket minimum provided for all industries by Section 6 and the highest minimum wage which may be applied as the Act now stands, *i.e.*, 40 cents per hour.

No other duties or powers are explicitly provided by statute for any industry committee. The Administrator's regulations state that "An industry committee may, at any time, recommend to the Administrator that the scope of the industry as defined in the order appointing the committee be enlarged, modified, or restricted." (Section 511.17). As indicated above, following suggestions from the Administrator, the existing committees and their subcommittees have given considerable study to this vital matter of interlocking industry-definition.

Subsection (c) of Section 8 authorizes any industry committee to recommend

"such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex."

This paragraph seems potentially important and undoubtedly was regarded as a compromise which paved the way for enactment of the statute; but the only use thus far made of it has been by the Hosiery Committee, which is recommending

[6] Two, at least, of the recommendations hitherto made by industry committees include proposals to the effect that the employments in question shall be reviewed by committees for these industries, not more than one year after these recommendations are made effective.

(unanimously) a minimum of 32½ cents for its seamless branch and 40 cents for its full-fashioned branch. It might be legal to establish occupational classifications, but this is a mooted point, and of course there is much less occasion for minimum rates of 40 cents or less for skilled than for unskilled workers. Moreover, the attempt to secure agreement on different minima within an industry, according to occupations, would add many difficulties to those involved in fixing a single minimum, applying mainly to workers of little skill.[7]

It will be observed that differentials according to sex and geographic regions, both of which were very commonly employed in the NRA codes, appear to be explicitly ruled out by this statute. Study of the clause "No classification shall be made . . . *solely* on a regional basis . . ." (italics added), however, in its context, indicates that regional classifications might be valid if supported by strong evidence as to "relevant factors" like those cited in the law. This mandate might ultimately be held to sanction differentials according to population density (size of village, town, or city), which were also much used in the NRA, provided that the Administrator and the courts became convinced that living costs are generally lower in smaller than in larger places of work and residence. It is widely believed that a given money wage will produce a higher level of real wage in a smaller than in a larger city; and the somewhat smaller average size of cities in the South than in the North doubtless has accounted in part for the lower averages of money wages in the former region. The statistical data at present available, however, on variations in living costs suggest that differences *within* northern and southern regions are greater than differences *between* regions.

Subsections (d) and (e) of Section 8 specify the procedure of the Administrator after an industry committee has made its recommendation, and give some hints as to the lifetime of any committee, which hints are supplemented in the Administrator's regulations. These subsections read as follows:

"(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

"(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry

[7] The recommendation of the Apparel Committee provides for a rather extensive subdivision of the industry with minima ranging from 32½ to 40 cents an hour. There are seven separate divisions under Women's Apparel, five under Men's Wear; and twelve under Accessories and Special Products. (1939) 2 WAGE & HOUR REP. 297.

on or after such expiration unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator, by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry."

It is quite clear, from subsection (d), that, if the Administrator disapproves of a committee's recommendations, he may dissolve that committee and appoint another one to study the industry and to make its recommendations. Conceivably this process might lead to several hirings and firings of committeemen for a single industry before a recommendation was adopted; in any case it is also clear that it is always the industry committee which proposes a minimum wage rate (within limits of the blanket rates for the period), whereas the Administrator disposes, subject to court review as mentioned below.

The final one of the Administrator's regulations relating to industry committees further interprets the law's provisions regarding the committee's lifetime as follows:

"*Section 511.22—End of committee's function.* When a committee has submitted a report, as provided in section 511.19 hereof, it shall cease to perform any further functions until reconvened by the Administrator; provided, however, that the Administrator may dissolve the committee after it has submitted its report."

It seems probable that the Administrator will not dissolve a committee (in case he accepts its recommendation) until his own public hearings are concluded, because in this hearing it is the committee's, as well as the Administrator's, recommendation which is put forward for comment and criticism from any quarter. Since each committee contains anywhere from 15 to 48 persons, and a considerable number of industries may have to be provided with committees, it is easily seen that dissolution of each committee after its report is made (or after the Administrator's hearing) reduces the opportunities for embarrassment of full-time members of the government by independent activities among all these committeemen of semi-official status. Clearly these industry committees play no part in enforcement of the law, as did the Code Authorities under the NRA.

Apparently Section 8, subsection (e), read in the light of Section 6, subsection (a), contemplates that the flexibility of minimum wage rates should not necessarily be in one direction only, but that at any time while the Act is in force the Administrator may appoint an industry committee, or call on any one which has already been appointed and not dissolved, for study and recommendation; and, if the preponderance of evidence sustains such recommendations, the existing minimum rate may be lowered, though not below 30 cents per hour.

Subsection (e) may well be modified somewhat, before October 1945. As it stands, it is far from clear as to when the industry committee recommendations must be made in order to continue in force wage orders made before these seven years have expired, or to prevent the automatic application of the law's blanket 40-cent minimum, in 1945, in any industry or industries. During 1940-45 the Administrator

must take the initiative, and sustain the burden of proof, to *raise* the effective minimum from 30 toward, or up to, 40 cents. Thereafter, as the law now stands, the position will be reversed, and he must take the initiative and sustain the burden of proof in order to *lower* the effective minimum to or toward 30 cents.

Although it is always the industry committee which proposes a wage order, the Administrator evidently has large indirect powers of initiative through his freedom of choice of committee men and his express power to reject the recommendations of any committee and to discharge that committee and appoint a new one for the same industry. These arrangements, however, are thought to satisfy constitutional requirements of due process and to avoid unconstitutional delegation of legislative powers to the Administrator. In case the Administrator dissolves any committee which has not made a recommendation, or rejects any committee's recommendations, presumably he would issue an explanation giving the particulars of his objection to the committee's procedure or recommendations or both.

Much informal contact is normal between the Administrator's staff and the personnel of the committees. If a committee at its organization meeting might wish to recommend at once a national minimum rate of 40 cents an hour for its industry, the Administrator's representatives would undoubtedly advise against such a move and would likely point out that such action by the committee would not fulfill the requirements of due process, in that it is not based on a hearing at which sufficient opportunity for submitting evidence is extended to all parties interested.

This mention of due process leads to some further consideration of the committee's procedure in gathering evidence, and of the provisions of Section 10 of the Act, providing for court review of the Administrator's orders. The latter point may be disposed of briefly, since no order has yet been issued and hence no possibility has arisen of court review. Section 10 provides in part that:

"Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. . . . The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. . . ."

No mention is explicitly made in the above section of the industry committee concerned; but in case any such order is reviewed, the court would doubtless give attention to the record of evidence collected by the committee, as well as its recommendation, in determining whether the Administrator's findings of fact were actually supported by substantial evidence. The industry committee's collection of evidence as the basis for its recommendation, which is thus a key point in the due process prescribed by this law, deserves some further comment here. These comments must

be couched in general terms, since most particulars of the investigations thus far conducted have not yet been made public. The information brought to the attention of the committee is of two principal sorts: (1) that which is submitted to it by the Administrator's staff, and (2) that which comes from interested persons.

Within the first of these categories special importance attaches to wage statistics collected by the United States Bureau of Labor Statistics, some of these data being collected with particular reference to the needs of the Wage and Hour Administrator. Tabulations of the latest such materials available, as well as the most nearly relevant census data, are likely to be made available to members of each committee at its organization meeting; and the Administrator's staff secures more data and makes further analyses as the committee's work proceeds. One comprehensive exhibit of the data thus provided by the Administrator's staff for the Textile Committee, through the cooperation of the U. S. Bureau of Labor Statistics, is the survey of hours and earnings in cotton manufacturing.[8] Such wage data are samples, not complete censuses; but they give reliable indications, *e.g.*, as to how many workers in the industry, of each sex, were (in the period of the survey) earning less than 25 cents, how many less than 27½ cents, and so on; also in what states and in what sizes of plants these lowest-paid workers were employed.

The above-cited wage survey in cotton-goods manufacturing, for example, showed that in August 1938, 8.3 per cent of all workers in a large sample (319,000 employees) were earning below 25 cents an hour, and that most of these were in the South. Many of these people, presumably, were raised to 25 cents when the Fair Labor Standards Act took effect, October 24, 1938. The same survey showed that, in August 1938, 34.7 per cent of all the workers covered were earning below 32½ cents; here is one measure of the meaning of this committee's proposal of a 32½-cent minimum, to be set as soon as possible. Naturally these low earnings were heavily concentrated within "unskilled" occupations, and in the South—a little over 6 per cent of all workers in the Northern sample earned below 32½ cents, contrasted with 44.2 per cent of those in the Southern sample.[9] These scraps of data illustrate the materials at hand, and convey an idea of the magnitude of the task.[10]

With regard to evidence submitted to an industry committee by interested persons, reference has already been made to the committee's powers of subpoena; and orders may also be issued for the taking of testimony by deposition. Up to the present time, however, these powers of subpoena and deposition have not been exercised; whereas considerable use has been made of public and semi-public hearings in which interested persons may voluntarily appear and submit such evidence and arguments as they choose. Stenographic records are made of proceedings in committee meetings

[8] Hinrichs, *Wages in Cotton-goods Manufacturing*. U. S. Bureau of Labor Statistics, Bulletin No. No. 663, 1938.

[9] *Id.* at 81-84.

[10] It should also be remarked that the Southern cotton manufacturers complied with the 30-cent minimum for *inside* workers of the NRA in 1933—and with a 22½ cents minimum for outside labor—and that the blanket 30-cent minimum will apply to all its workers from October 1939, except as modified upward through acceptance of a recommendation by the industry committee and the Administrator—and except for a small number of learners and handicapped workers.

of all sorts, at least so far as the Administrator's funds permit, and mimeographed copies are circulated among committee and staff members.

The "interested persons" who thus appear before the committee have consisted almost exclusively of officials of trade associations and trade unions directly concerned. The sections of employers and workers of the industry who are organized but little or not at all (many of these in small and/or remote establishments) are likely to be represented only very indirectly; and, of course, the same may be said of the general public and consumer interests. The implications of these representations will be discussed a bit in my concluding section.

The last matter to be noticed under our heading, "Procedures and Problems," is the time consumed in reaching committee recommendations. Various critics consider that these processes have been unduly deliberate and that some industries should have had minimum wages set above 25 cents an hour within a few months after the law took effect. The processes of collecting information and digesting it and deliberating over it, which are required for full compliance with the law and with the Constitution, at best consume more time than is agreeable to some of these critics; and some members of a committee might conceivably exercise dilatory tactics, even up to the point where the Administrator would discharge the committee for failure to make reasonable progress. It seems probable, however, that not much of the time which has elapsed since appointment of industry committees was begun is attributable to slowness of work within the committees. The rather narrow limits within which the minimum wage rates may be modified by the Committees and the Administrator, and the tendency to draw the personnel of the committees from the most highly organized sections of their industries, make it probable that a committee will not require many meetings or very long deliberations to reach a recommendation. A much more important limiting factor is the capacity of the Administrator's staff to deal with the innumerable other urgent problems which are presented to them, and at the same time to see that each committee's work is carried on in the light of the most adequate information that can be made available. This limitation, of course, is in large part dependent on funds allotted for the administration of the Act.

III. SOME INFERENCES WITH REFERENCE TO CONSTITUTION, WORK, AND PROBLEMS OF THE INDUSTRY COMMITTEES

The matters discussed above may now be reviewed in another fashion through an attempt to state succinctly the significant features of the industry committees. For this purpose I shall concentrate on two aspects, or sets of issues, namely: (1) What sort of advisory committee structure is likely, economically, to give due process of law, and to command adequate political support in the fixation of minimum wage rates, industry by industry? (2) How do and how should the industry committees appraise the extent, causes, and treatment of low wages in their trades? Should the low-wage sections be regarded as "chiselers"?

(1) *Due Process and Political Support.* I gather that the industry committee pro-

visions of the Act were of some importance in securing political backing for the latter, for at least two reasons: (a) the committee scheme is part of a prescribed procedure which was calculated to avoid the constitutional rocks on which the NRA foundered; and (b) liberal-to-conservative people regard the industry committees as checks and balances tending to modulate any inclination which the Administrator might have, or develop, toward raising minimum wage rates too far and too fast. With the changed outlook of the Supreme Court the former consideration, I suppose, has become less weighty (though legally-minded friends of the law are still concerned to minimize constitutional grounds for objection to its provisions and administration); and the irritation which has developed in some labor quarters at this law's delay is no doubt directed in part at the time and expense required to get recommendations through the industry committees.

From other points of view, too, the industry committees produced by this law are somewhat vulnerable to criticism, at least as contrasted with smaller and fuller-time advisory committees (more or less as used by the NRA), the latter type of board advising with reference to larger factors and sections than do the industry committees of the present Act. The immense complexity of the national wage, hours, living-cost, and price structures, and the information needed for this new venture in national minimum wage regulation, are not fully comprehended by anyone; and it is rather optimistic to hope that the majorities of all or most of the committees will become aware of the "right questions to ask," or pay sufficient attention to the information which the Administrator's staff and the interested parties make available to them. I presume no one can say how many more industry committees will be appointed, even within the next year or so; but probably there remain scores of trades of interstate significance, each with sufficient industrial consciousness and sufficient workers paid less than 40 cents an hour, to require appointment of such a committee. Considerations of traveling expense and of the assistance required from the Administrator's staff for each committee and subcommittee make it impossible for more than a small fraction of the committeemen to be able to improve appreciably their original guesses as to which minimum rate or rates (taking due account of potential classifications in each industry) will produce just less than "substantial unemployment" in each industry.

The Administrator, to be sure, is able in some measure to keep down the number of active committeemen, under the existing law, by means of various devices. One, already in use, is delegation of important problems to subcommittees. Another is appointment of the same person to more than one committee. Something more might be done toward persuading employers in the industries yet to be organized, to be content with smaller representations than have hitherto been appointed, in which case the labor and public delegations could be made correspondingly smaller without much objection, it is believed, from any quarter. Conceivably some scheme might be devised for amending the law to permit unequal numbers of persons (with equal unit voting powers) among the public, employee, and employer groups in each

industry committee; but in this case one difficulty would lie in making satisfactory provision for a quorum.

Even if the committees are smaller in the future, however, the number of industries requiring committees seems inevitably to make the number of committeemen large, in relation to the services which the Administrator's staff can provide; and this circumstance, together with the rather short lifetime of each committee, seems a bit unfavorable to the sound principle thus enunciated by the Administrator: "The result should be wage recommendations predicated on facts and not arrived at either by coercion or by swapping concessions."[11]

In short, the present advisory system helped to secure early acceptance and support of the law by organized employers and labor. But if, by reason of the characteristics sketched above, it comes to be thought to operate inefficiently, there might develop a serious reaction against it, as pressure groups in the industries became dissatisfied. And if organized employers or labor, or both, to a material extent should become uncooperative, not only would the enforcement of the existing minima become much more difficult, but also the upgrading of minima from 30 toward 40 cents would be retarded, and a crisis might develop as the universal 40-cent minimum of 1945 drew near.

(2) *Unorganized Employers and Workers: "Chiselers" or Forgotten Men?* We may reasonably assume that all or nearly all members of the industry committees consciously try to act in the general public interest, and that in not a few instances they do voluntarily sacrifice the interests of themselves and of their ordinary associates to this end; though of course lower standards of appointment than have thus far prevailed might appear in the future. A much larger problem, I think, than the *intentions* of the committeemen lies in their *ability* to assess correctly the interests and problems of all groups affected by wage orders in their respective industries. However large the committee and however small its industry, not all sections and groups in the industry can be directly represented by these committeemen. The law, it will be recalled, quite properly provides for consideration of geographical sections in the appointment of committee members; and necessarily the organized employers and workers can be most effectively represented. "Effectively represented" is used here with a double significance—in the sense of knowledge of the needs and capacities of constituents, and in the sense of the enormously greater political power of a representative who has a strong pressure group behind him, as compared with a representative who tries to speak in behalf of the needs of an equal number of other persons, who, however, cannot be depended upon to vote as a *bloc*. From this latter standpoint it may be anticipated that, in the long run, the Administrator will tend to attach less weight to the views of the public committeemen than to those representing workers and employers.

It seems probable that the employers and workers in the lowest-wage plants tend to be less strongly organized than the higher-wage groups; and that the workers in the former category are more largely outside trade unions, and in shops of small and

[11] (1939) 6 LAB. INF. BULL. No. 4, p. 3.

remote employers who have little influence or participation in trade associations. Many of the lowest wages are in rural to small city locations; and this density-of-population factor interacts with other factors. For instance, wages tend to be low in areas within which the industry is under especially severe financial pressure and is tending to disappear, as well as those in areas within which the industry is growing, partly on the basis of using workers accustomed to still lower incomes, and where cost of living is perhaps somewhat lower than in the more strongly organized centers. Building costs, for example, may be higher where building labor is strongly organized. It is impossible to appraise accurately the probable impact of any contemplated wage regulation on a complex of this sort, and each industry committeeman naturally is most clearly aware of a proposed wage order's bearing on the part of the industry with which he is personally associated. The representatives of organized employers and workers both are likely to regard the low-wage payer and also the low-wage receiver as "chiselers" who secure private advantage by undercutting the rates of the organizations within their respective fields.

The employers in each section and classification of the industry naturally hope that the new wage and hour regulations will bear more heavily on competitors, particularly those in other regions, than on themselves. The NRA labor provisions were obviously supported by many employers and others in this spirit. And among considerations which influence the trade union committeemen are the getting rid of their employers' arguments based on the low wages of (perhaps distant) competitors, and letting government take responsibility for any unemployment of labor and capital which may follow from raising the minimum wage.

Since it is utopian to imagine the appointment of individuals who could much more adequately and directly interpret the positions of the unorganized workers and employers than do the present committeemen, a rather special responsibility lies upon the public members to try to see that the interests of all sectors of the industry, as well as of consumers, are given full consideration. Some of the public members, however, doubtless have parochial views, some are rather employer-minded, others may have opposite inclinations. And, in between the extremes, there are innumerable variations based on the natural limitations of human knowledge and attitudes. The southern public members of the Textile Committee voted with southern employers against a 32½-cent recommendation, and the scraps of data given above[12] show that their position had at least one rational "leg to stand on."

The law's warning against causing "substantial unemployment," to be sure, implies that it shall not be necessary to demonstrate beyond reasonable doubt that *no* fresh unemployment will be produced by any minimum wage order; and it is widely agreed that this is a sound and progressive position. Yet new unemployment which is a negligible percentage of all workers in an industry may be very substantial with reference to low-wage localities. This consideration was doubtless in the minds of the persons who drafted subsection (c) of Section 8, which provides that, if any industry committee does recommend classified rates, it

[12] Page 361, *supra*.

". . . shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment *in such classification*." (Italics added).

Might any of the difficulties surveyed above be mitigated, by modifications of the law or administration with reference to the industry committees? It is always much easier to recognize elements which are not quite satisfactory than to prescribe dependable means of improvement; moreover, my own information is much too limited for detailed constructive suggestions. It seems to me it has been wise to make haste rather slowly up to this time, but that some acceleration of the processes may be hoped for in the near future—the administration must discharge its duty to low-wage earners as promptly as possible and prompt action will moreover tend to reduce the mass of uncertainties which are retarding business activity. The public memberships in the industry committees seem to give more effective neutral advice and influence than has been provided as yet in most of our other governmental agencies. My remarks above on the lack of thoroughness which must characterize much of the work of the industry committees under present conditions must not be interpreted as doubt that these committees are valuable adjuncts to the Wage and Hour Administration. Each industry is the source of livelihood of tens to hundreds of thousands of families, its problems are extremely complex, and these are deserving of careful study by its own committee.

My impression is, however, that some formal intermediate organization might be helpful, between the Administration and the industry committees. It is true that the Administrator's staff in an important sense provides two-way communication between the Administrator himself and the industry committees; but I suggest there might be considerable benefit from an advisory committee of larger scope, or perhaps more than one. Such a committee, or committees, should be tripartite (containing representatives of the public, of employers, and of employees), and would doubtless be recruited from industry committee members, with regard especially to their apparent talents and attitudes, and only secondarily with regard to geographic and industrial distribution. These individuals should retain "amateur standing" by per diem pay rather than salary, and, by giving longer and more intensive service, they should learn much more about interrelations in the whole wage and hour structure than can most of the present committeemen. No doubt any executive must always rely heavily on informal advice from some sort of "kitchen cabinet" (*i.e.*, those people whose advice, at the moment, he considers best), and any formal super-committee might reasonably be considered an encumbrance. Yet the obvious merits of the recognition and responsibility of a formal advisory committee might well outweigh its less desirable characteristics.

Although each industry committee is directly concerned only with wage variations *within* its industry, in the long run the Administrator must deal through the committees with variations *among* all industries and sections; and a few of the interrelations among these differences may be briefly suggested in closing. The intention of

the Act apparently is to enforce as near a 40-cent hourly minimum as soon as possible, in every industry in which not more than a moderate amount of unemployment will be thereby produced. This minimum rate is to be set with little, if any, reference to the relative steadiness of work in the industries and establishments affected. The hours and overtime provisions of the law do operate, to some extent, in favor of decasualization of labor; and among proposed amendments to the Act is at least one, referring to hours and overtime, which would encourage "constant wage" arrangements. It is to be hoped that the minimum-wage-setting processes will not exert pressure against decasualizing forces.

Among industries, there are already many differences in minimum earnings beyond those reasonably explicable by variations in qualities of the respective unskilled labor supplies and in the comparative repugnance of the tasks. In effect, the high-wage industries appear thus to carry out a sort of *de facto* profit sharing—in part, perhaps, by reason of sluggish flows of capital and labor into them. The Fair Labor Standards Act adapts itself to such variations (among the low-wage industries), and a main purpose of the industry-committee apparatus is to provide for variability of minimum wage rates in accordance with current abilities of industries to pay. Up to the present time the committees and the Administrator have been obliged to *estimate* effects of various hypothetical minima, between 25 and 40 cents, upon employment. After orders begin to be issued, and as statistical data and other evidences continue to be accumulated, a broader base of experience will be had for future actions.

Within many industries, as noted above, there are also marked wage differences, in the causation of which such factors as "migration of industry," quality and price of product, and labor organization may be discerned. Probably in the more highly-organized sections there remain relatively few workers who are exploited in the sense of being paid less than the local going rates for similar services, and of course the hourly earnings of organized labor tend to be higher than of unorganized. Under some conditions the prices of the former's products are thereby raised; and both employers and workers in these unionized sections are directly benefitted in the degree that the government enforces increases of wage rates in the less organized sections. Contrariwise, the employers whose labor is not yet effectively organized tend to expand operations by means of lower prices based upon low, sometimes shockingly low, wages, so far as a labor supply is thus available, presumably because its alternative opportunities are still less favorable. If the latter sections are allowed to expand, their wages tend to rise with increasing demand and with increasing labor organization; and the former sections are faced with many distressing problems of deflation—which, however, also supply stimuli toward utilization of increasingly efficient methods of production. In these considerations we find further confirmation of the wisdom of the "without substantially curtailing employment" language of the Act, and of the tendency of the committees to recommend single national minima, intermediate between those prevailing in the highest- and lowest-wage sections of their respective industries.

THE ADMINISTRATION AND ENFORCEMENT OF THE FAIR LABOR STANDARDS ACT*

SAMUEL HERMAN†

MR. WOODRUM (of Virginia). " . . . *As I understand it, Mr. Andrews proposes to speak softly and move cautiously.*"
MR. ANDREWS (Administrator of the Wage and Hour Division). "*Yes, sir.*"[1]

Twenty-five cents an hour multiplied by 44 hours equals $11.00. In this simple bit of arithmetic may be a key to the startling difference in industry reaction to the administration and enforcement of the Fair Labor Standards Act[2] on the one hand and to the National Labor Relations Act[3] on the other. Both acts are important elements in the pattern of New Deal labor legislation. One, concerned with voluntary collective bargaining, has been fought unremittingly at all stages and on all fronts. The other, concerned with mandatory labor standards, has been accepted with little or no resistance. In contrast with 25 cents an hour under the Act, the average hourly wage obtained through collective bargaining agreements in the automobile industry was, for the tumultuous "sit-down" first nine months of 1937, 88 cents an hour.[4] Labor cost is an important element in industry acceptance or rejection of administration and enforcement policies in labor legislation. The National Labor Relations Board is in a maelstrom of employer criticism. The same critics, in a six-months honeymoon, lauded the Wage and Hour Division.[5] Is a possible explanation

* The writer gratefully acknowledges invaluable assistance in the gathering of material by Harry L. Isikoff, Esq., of the District of Columbia Bar. Needless to say the opinions expressed in this article are the writer's own.

† Ph.B., 1929, J.D., 1931, University of Chicago. Member of the legal staff, Office of the Solicitor, United States Department of Agriculture. Non-resident Consultant, Graduate School of Public Administration, Harvard University. Member of the Illinois Bar. Contributor to periodicals on economic, legal and political subjects.

[1] *Hearings before Subcommittee of the Committee on Appropriations, House of Representatives, on the First Deficiency Appropriation Bill for 1939*, 76th Cong., 1st Sess. (1939) 65-66 (hereafter referred to as *Hearings on First Deficiency Bill*).

[2] 52 STAT. 1060 (1938), 29 U. S. C. §§201-210 (Supp. IV, 1938) (hereafter referred to as the Act.)

[3] 49 STAT. 449 (1935), 29 U. S. C. §§151-166 (Supp. IV, 1938).

[4] *United Automobile Workers Research Bulletin No. 1* (March, 1938). For employee coverage of the Act and average earnings in certain industries see Daugherty, *Economic Coverage of the Fair Labor Standards Act, infra*, 406, particularly Table 4, p. 413. *Cf. Joint Hearings Before Committee on Education and Labor, Senate*, and *Committee on Labor, House of Representatives, on S. 2475 and H. R. 7200*, 75th Cong., 1st Sess. (1937) 338-342 (hereafter referred to as *Hearings on S. 2475*).

[5] Indication that the honeymoon may be over is found in the resolution adopted by the United States Chamber of Commerce at Washington, D. C., May 4, 1939, recommending repeal of the Act. N. Y. Times

to be found in the fact that on the eve of the effective date of the Act, in no state were the average weekly industrial earnings as low as $11.00?[6]

The most highly criticized single administrative action of the Wage and Hour Division was the official interpretation that the provision of the Act requiring compensation for overtime in excess of maximum hours "at a rate not less than one and one-half the regular rate at which employed" extended to *all* employees whatever paid.[7] The interpretation urged upon the Wage and Hour Division was that the overtime provision applied only to employees paid the basic minimum wage rate. On the basis of a 44-hour week and 22 hours overtime an employee earning $100 per week would be entitled to $175; an employee earning the minimum would be entitled to $19.25. At the opening of the first session of the 76th Congress, Administrator Andrews announced his approval of an amendment to the Act which would exempt employees on a monthly basis or a guaranteed monthly salary of $200 or more.[8] Requests to Congress by the responsible administrative agency that the applicability of the statute administered be curtailed are rare. Restrictive amendment as administrative policy must have compelling reasons. Some of these reasons will be considered herein.

Simple arithmetic also acts as framework for, and has a large part in determining, the problems and policies of administration and enforcement. As more employees are brought within the Act by the escalator wage and hour clause, more problems of interpretation and administration will arise.[9] Attempted enforcement will meet greater resistance from employers of labor in the higher wage categories. Of regulatory statutes since 1933, none has a greater range of applicability,[10] none is so

---

May 5, 1939, p. 1, col. 4. Possible explanations: (1) three industry committees have recommended wage rates above 25c an hour; hosiery, 40c and 32½c, (1939) 2 WAGE & HOUR REP. 166; woolen, 36c, 2 *id.* 115-116; textile, 32½c without differential, 2 *id.* 155-156; (2) October 24, 1939, when the minimum rate becomes 30c, is drawing rapidly near; (3) criminal prosecutions have resulted in heavy fines, see note 114, *infra;* (4) consent decrees have been conditioned upon restitution to employees, *ibid;* (5) the "hot goods" provision has been effectively invoked, see note 123, *infra.*

[6] From compilation prepared by Commissioner Lubin, Bureau of Labor Statistics, U. S. Department of Labor, and contained in press release issued by Wage and Hour Division, October 31, 1938. In Wyoming, for August 1938, in manufacturing industries, the average weekly earnings were $32.16; in Michigan, $30.00; in New York, $25.51. Lowest were Georgia, $13.71, Mississippi, $14.16. From the employee's point of view, the average weekly earnings in any state may mean nothing, if he himself earns less than the average.

[7] Interpr. Bull. No. 4, Oct. 21, 1938. The Administrator announced on October 17, 1938, that, in his opinion, the Act did not require payment of overtime rates to salaried employees. (1938) 1 WAGE & HOUR REP. 1. Interpretative Bulletin No. 4, issued Oct. 21, 1938, officially reversed this interpretation. *Cf.* interpretation of National Association of Manufacturers, (1938) 1 WAGE & HOUR REP. 355-357.

[8] See (1939) 2 WAGE & HOUR REP. 3-4; see also page 389, *infra.*

[9] See Cooper, *The Coverage of the Fair Labor Standards Act and Other Problems in Its Interpretation, supra,* p. 333.

[10] Applicability of NIRA was, of course, greater but overextension was one of the grounds of its eventual invalidation. According to estimates of the Division of Economic Research and Planning of NRA, the NRA codes had a potential coverage of approximately 27,000,000 workers, on the basis of 1929 employment figures. As of January 1, 1935, approximately 89 percent of the possible coverage had actually been attained. The actual number of employees under NRA codes ran over 22,000,000. By August 1934, 22,022,000 employees were distributed among 517 codes. See MARSHALL, HOURS AND WAGES PROVISIONS IN NRA CODES (Brookings Institution, 1935) 3, 4.

dependent for the successful realization of the policy objectives of Congress upon the policy of administration and enforcement.

But the policy of Congress as expressed in the findings and declaration of policy of the Act and the policy of Congress relative to the functioning of the Wage and Hour Division were, in the beginning, not quite the same. Congress found that there were labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers,"[11] and tersely described the serious national effects of such conditions. It declared its policy to be ". . . to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."[12] The Act was passed after one of the hardest fought legislative campaigns in New Deal history.[13] Congress, through its exercise of the appropriation power, immediately assumed control of the tempo of correction and elimination of unfair labor conditions. $500,000 was asked.[14] $400,000 was appropriated for the fiscal year ending June 30, 1939; of this, $50,000 was allocated by the Department of Labor to the Children's Bureau.[15] It was immediately apparent that effective administration and enforcement would be greatly hampered. By January 1939, the Wage and Hour Division operated on a skeleton staff with borrowed personnel,[16] had 75 field inspectors,[17] having started with 23 (as contrasted with a conservatively estimated need for 603[18]), had been unable to establish even a remotely adequate organization,[19] functioned at great overtime pressure upon its own personnel in Washington.[20] From this point of view, the interim report of the Administrator to Congress was largely an apologia.[21] There had been no money.

A deficiency appropriation was sought. The Wage and Hour Division asked $1,350,000.[22] The Bureau of the Budget allocated $950,000.[23] The First Deficiency Appropriation Act, fiscal year 1939, effective March 15, 1939, appropriated $850,000, available for the balance of the fiscal year 1939.[24] The $850,000 was earmarked by Congress to include "reimbursement to State, Federal and local agencies and their employees for services rendered" and was available to pay for administrative expenses theretofore accrued.

[11] §2(a). [12] §2(b).

[13] See Forsythe, *Legislative History of the Fair Labor Standards Act, infra*, p. 464.

[14] Budget estimates submitted by the President. SEN. Doc. No. 226, 75th Cong., 3d Sess (1938) 1069. See N. Y. Times, June 17, 1938, p. 1, col. 7.

[15] Second Deficiency Appropriation Act, fiscal year 1938, Pub. L. No. 723, 75th Cong., 3d Sess., approved June 25, 1938. It will be noted that the Deficiency Act and the Fair Labor Standards Act were approved on the same day. The $400,000 was "to carry into effect the provisions of the Fair Labor Standards Act of 1938" including the functions of the Children's Bureau under the Act.

[16] *Hearings on Deficiency Bill*, 83. [17] *Id.* at 77.

[18] *Id.* at 56. [19] *Id.* at 55.

[20] *Id.* at 95. Testimony of the Administrator: "We have a tremendous amount of overtime. We have to work two shifts, the space is limited. We not only work two shifts, but we have a sort of shift and a half that works in the halls of the building, because we have not the space at the present time to get out all the stuff that we should."

[21] *Administrator's Annual Report to Congress*, for the period Aug. 15 to Dec. 21, 1938, released to the press on January 16, 1939.

[22] *Hearings on Deficiency Bill*, 73. [23] *Ibid.*

[24] Pub. L. No. 7, 76th Cong., 1st Sess., approved March 15, 1939.

By middle January, 1939, the total personnel of the Wage and Hour Division numbered 488, of which 111 were on loan from other agencies and not compensated from Wage and Hour Division funds. There were 18 lawyers, two borrowed from other agencies; 15 administrative employees in the Cooperation and Enforcement branch; 25 in the Wage and Hour Standard branch.[25] Of the 488 employees, 113 were in the field, distributed as between 13 field office staffs. Based upon the request for $950,000, the personnel of the Wage and Hour Division would number 754 including 248 inspectors. Estimates for the fiscal year 1940 call for 966 employees, 343 to be inspectors.[26]

To a great extent the ability to administer and enforce an act of this nature is dependent upon adequate personnel. Control by Congress may be indirect as well as direct. It may be by malnutrition through withholding of necessary funds, as well as by curtailment or expansion of powers through the formal process of amendment. Thus subject to the will of Congress, what, in brief, are the powers of the Administrator? What are the basic administrative problems arising out of the Act, the administrative policy in connection with the problems, the administrative set-up to accomplish the policy?

The substantive provisions of the Act are limited in number and simple in content.[27] The labor standards involved pertain, basically, to certain aspects of interstate commerce in goods. They affect the employment relationship, in respect to wages and hours of employees who are either engaged in interstate commerce or in the production of goods for interstate commerce.[28] A minimum wage of not less than 25 cents an hour is prescribed by the Act for the first year after its effective date and, thereafter, a sliding scale is provided, resulting in a minimum of not more than 40 cents an hour after the expiration of the seventh year.[29] The wage rates may, however, be increased above the minimum rate established by the Act (but not in excess of 40 cents an hour) by wage order promulgated by the Administrator, in accordance with a procedure relating to the appointment and functioning of industry committees.[30] Wage orders are an administrative device whereby applicability of the Act may be quickened.

[25] All data from *Hearings on Deficiency Bill*, 77-83.

[26] *Id.* at 77. Estimates of the completed staff of the Wage and Hour Division place the number at approximately 1500. *Id.* at 55. Before his appointment as Administrator, Mr. Andrews presided as New York State Industrial Commissioner over 7200 employees. *Id.* at 69. To administer the New York State minimum wage law, Mr. Andrews had over 360 inspectors, one to every 2500 covered employees. *Id.* at 56. *Cf.* Johnson, *The Administration of Minimum Wage Laws in the United States* (1939) 39 INT. LAB. REV. 171.

[27] Paradoxically, this very simplicity has created problems of interpretation and administration which enactment of the more detailed bill, as originally introduced, would probably have obviated. Adoption of the final simplification was on the ground, among others, that the proposed bill was too complicated to administer. *Cf. Hearings on S. 2475*, 579, 622, 645, 649, 753, 815; N. Y. Times, June 12, 1937, p. 2, col. 2, July 2, 1937, p. 26, col. 3. Yet numerous administrative devices designed to aid in administration and enforcement were eliminated in Congress prior to enactment, notably, as will be seen, an administrative rule-making power.

[28] §§6(a), 7(a). *Cf.* §3(b).

[29] §6(a).

[30] §8. See Dickinson, *The Organization and Functioning of Industry Committees under the Fair Labor Standards Act*, *supra*, p. 353.

As to hours, there is an outright prohibition against employment in excess of a work-week which, during the first year, is 44 hours and after the expiration of the second year is 40 hours, unless the employee is compensated for his employment in excess of the hours specified "at a rate not less than one and one-half times the regular rate at which he is employed."[31] Exception is made in the case of specified collective bargaining agreements or, for designated periods of time, in the case of industries of a seasonal nature.[32] Provision is made for exemption from the maximum hours provision for a period, or periods, of not more than 14 work-weeks in any calendar year, of certain types of employment involved in the processing of agricultural products.[33]

Complete exemption as to both wage and hour standards or hour maxima alone is allowed as to various categories of employment[34] and a special certificate procedure permitting sub-standard minimum wages, subject to limitations prescribed by the Administrator as to "time, number, proportion and length of service," is provided for learners, apprentices, messengers and handicapped workers.[35]

The child labor[36] provision of the Act prohibits outright the shipment, or delivery for shipment, in interstate commerce, of "any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor is employed,"[37] but children employed in agriculture or as actors in motion pictures or theatrical productions are exempt.[38]

The fundamental administrative problems in connection with the Act are similar in principle to those found in other New Deal regulatory legislation. Essentially, the problems are in law and economics and lie between two poles. The first is the desirability of fixing in law a positive formulation to guide and control administration and to provide a basic certainty as to the effect of the legislation on industry and employees; the second is the need for flexibility in meeting specific industrial situations in terms of changing economic factors unpredictable at the time of enactment. The primary administrative problem of the Wage and Hour Division may be put as follows: In an act designed to increase employment and purchasing power of employees, will the establishment of fixed levels of minimum wages above and maximum hours below the current industrial levels curtail rather than increase employment? If an act designed to increase employment would, in net effect, decrease employment, it would more than fail to accomplish its objective; it would aggravate and foster the very evil intended to be remedied. Since the effect of wage and hour regulation upon employment and unemployment was extensively debated in Congress, it is apparent that the issue was finally referred, in part, from the legislative to the administrative process. Section 8 of the Act, providing for wage orders to be

[31] §7(a).
[32] §7(b).
[33] §7(c).
[34] §§13(a), 13(b).
[35] §14.
[36] See Lumpkin, *The Child Labor Provisions of the Fair Labor Standards Act, infra*, p. 391.
[37] §12(a). *Cf.* §3(b).
[38] §13(c).

issued industry by industry, represents the dilemma of the legislative process in meeting problems of modern economy too subtle and complex to be solved by legislative statement. The exemption provision of the Act also centers upon the problem of unemployment, since discretion is conferred upon the Administrator to grant or refuse certain exemptions, a discretion conditioned upon the effect of mandatory labor standards on employment.

Other problems were removed from the process of administrative determination by outright prohibition. Thus, no sex classifications were permitted in the matter of wages and hours, although the applicability of wage and hour legislation to men represented a departure from prior, and by now traditional, state legislation applicable only to women and minors.[39] The matter of the effect of the Act upon unions was resolved by excepting from maximum hour provisions certain hour arrangements arrived at through collective bargaining.[40] The area of administrative action, although circumscribed by the specific provisions of the Congress, was not entirely clarified. Compromise statutory solutions necessitated administrative interpretation.

To deal with these and other important administrative problems, the Wage and Hour Division was set up as a semi-autonomous agency within the Department of Labor, the Act providing for appointment of an administrator to direct a Wage and Hour Division.[41] The Secretary of Labor could thus coordinate the broad policies of the Wage and Hour Division and of the Department of Labor. Since the administration of the child labor provisions of the Act had been placed within the jurisdiction of the Children's Bureau,[42] and since the Bureau of Labor Statistics had supplied, and would continue to supply, needed data for the administration of the Act,[43] the creation of a Division within the Department seemed justified. Duplication and unnecessary expense were avoided by utilizing the budgeting, personnel, and supplies facilities of the Department.[44] Liaison activities with the states for the purposes of assuring cooperation in enforcement, conference with state labor officials, preparation of model state minimum wage and labor legislation, were aided by the long-time experience of the Department. The original appropriation for the Wage and Hour

[39] §8(c). See de Vyver, *Regulation of Wages and Hours Prior to 1938, supra*, p. 323. For a discussion of the due process features of a recent Oklahoma minimum wage law applicable to men, as well as to women and children (Okla. Laws, 1936-1937, c. 52), see Associated Industries of Okla. v. Industrial Welfare Commission, 90 P. (2d) 899 (1939).

[40] §7(b).

[41] §4(a). The bill originally introduced had provided for the creation of a labor standards board to be composed of five members with staggered terms. §3(a). The labor standards board was to exercise the quasi-judicial and quasi-legislative functions in the field of fair labor standards customarily exercised, with due regard to the particular type of regulation involved, by independent regulatory commissions. The President's Committee on Administrative Management has referred to independent commissions as the "headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers." ADMINISTRATIVE MANAGEMENT OF THE EXECUTIVE BRANCH OF THE UNITED STATES (1937).

[42] §12(b). *Cf.* §§3(1), 11(b).

[43] $150,000 of the deficiency appropriation for the balance of the fiscal year, ending June 30, 1939 (see note 24, *supra*) was intended to be transferred to the Bureau of Labor Statistics for special studies in connection with garment and boot and shoe industries. *Hearings on Deficiency Bill*, 67.

[44] *Id.* at 84.

Division was within the Department of Labor appropriation and under the direction and control of the Secretary of Labor.[45]

The present organization of the Wage and Hour Division follows conventional lines established in governmental units administered by a single administrator.[46] General supervisory activity and legal responsibility for the administration of the Act is vested in the Administrator. Closely connected with the Office of the Administrator is the Office of the Deputy Administrator. Responsible for efficient administration and coordination of the activity of the Division, the Office of the Deputy Administrator assists in the development of the organization and procedures of the Division, prepares instructions, reviews regulations, orders, correspondence and forms, and serves as liaison with other agencies. Industry committees are coordinated through the Office of the Deputy Administrator.

Functionally, there are three main branches in the Wage and Hour Division: Legal, Wage and Hour Standards, and Cooperation and Enforcement.[47] The two latter are under the direction of Assistant Administrators.

The Office of the General Counsel is responsible for all legal activities of the Division, and, when completely established, will have three sections. At present there are two main sections, Opinion and Litigation. A Wage Hearing Section is being slowly built up. (a) The Opinion Section drafts regulations and administrative orders, reviews hearings held by the Administrator or his representatives, and drafts findings and orders for the Administrator. It is responsible for the preparation of legal interpretations and formal legal opinions, and the drafting of legislative proposals. (b) The Litigation Section represents the Administrator in civil litigation growing out of the Act, and, as will be seen, has primary responsibility for appearing in the courts on behalf of the Administrator in injunction and other civil proceedings. It recommends criminal prosecutions to the Department of Justice. In general, it advises the Cooperation and Enforcement branch on enforcement problems. A liaison attorney has been assigned to the Cooperation and Enforcement branch for the purpose of reviewing complaints to determine whether they contain the necessary legal prerequisites to allow recommendations for court action.[48]

The Wage and Hour Standards branch is responsible for the arrangements and functioning of industry committees, the collection and analysis of economic data, and the granting of exemptions. It is divided into an Industry Committee Section, a Hearing and Exemption Section, and an Economic Section. The Industry Com-

[45] The appropriation was to meet a Department of Labor deficiency. See note 14, *supra*.

[46] Information as to the organization of the Wage and Hour Division is in part based on interviews at the Wage and Hour Division, in part on a functional chart approved by the Administrator, Jan. 6, 1939.

[47] A Business Management branch has personnel, fiscal and training sections. An Information branch has press, editorial, magazine, labor and trade papers and radio sections.

[48] Regional attorneys will be provided for regional offices when, and as, established to render advice on questions of law involved in enforcement, to answer legal inquiries and to assist in litigation growing out of violations of the Act. As all-industry committees are designated, the legal branch furnishes a legal advisor to such committee to assist in the presentation of the evidence upon which the Administrator issues a wage order. The advisor confers with the Industry Committee section of the Wage and Hour Standards branch on legal questions.

mittee Section assists in the selection of industry committees, defines their jurisdiction and establishes rules and procedure. It serves as liaison between industry committees and other governmental agencies and assists the committees in completing their tasks.

The Hearing and Exemption Section conducts hearings, on request, to define "seasonal industry" and "area of production," and recommends the granting or refusal of applications for exemptions under Section 14 for learners, handicapped workers, apprentices and messengers. It is also charged with handling the great number of requests currently arriving at the Division for modification of regulations. The Economic Section compiles and analyses economic data, advises the Administrator on the recommendations of industry committees, and serves as economic advisor to all branches of the Division.

The Cooperation and Enforcement branch is responsible for the regional field activities relating to cooperation and enforcement, participates in the development of enforcement policies and procedure, and in the establishment of cooperative agreements with the states. It is divided into a Field Operations Section, a Policy and Standards Section, and a Regional and Field Office Section. The Field Operations Section arranges and supervises regional and field enforcement activities of the Division; serves as liaison with the regional offices and clears all matters going to and coming from the field. The Policy and Standards Section develops basic standards for cooperative agreements with the states and formulates basic procedure in field operations; examines violations referred to Washington and reviews reports from regional and field offices; and maintains a current review of enforcement activities. The Regional and Field Offices Section is responsible for the successful administration of the Act in the regions; for direction and supervision of the field instruction staff and for relations with cooperating state agencies. It makes inspections and investigations necessary for enforcement, and aids employers and employees in understanding the terms of the Act.

As of April, 1939, there were four regional offices of the Wage and Hour Division: Boston, New York, Cleveland, San Francisco.[49] As distinguished from regional offices, there were twenty-six field offices located wherever space could be rendered available in the field by existing governmental agencies. Field offices are usually located in offices of the Social Security Board and the National Emergency Council,[50] and serve as central points for inspectors and as information centers. Plans for the regional offices, at present greatly understaffed, provide that each office be manned by a regional director, a supervising inspector, an attorney, an enforcement representative, a senior inspector, inspectors, and a clerical staff.[51] Present organization plans contemplate twelve regional offices and seventy-six field offices to be established within the fiscal year ending June 30, 1940.[52]

An important phase of Wage and Hour Division policy relates to other agencies of the Government, to state labor departments and officials, and to labor unions and

[49] Information obtained from Wage and Hour Division. *Cf.* (1939) 2 WAGE & HOUR REP. 26-27.
[50] *Hearings on Deficiency Bill*, 57.
[51] *Id.* at 82.
[52] *Id.* at 83-84.

trade associations. The range of its regulatory activity, together with the limited resources of the Wage and Hour Division, would make adequate administration impractical, if not virtually impossible, without the aid of outside sources. The United States Department of Labor participates actively, on various fronts, to aid in the administration of the Act.[53] Legislative strategy attempting to isolate the Wage and Hour Division by placing control over appropriations to the Division in the Administrator rather than in the Secretary of Labor seems to have failed in the first session of the 76th Congress. Press reports indicate a *modus vivendi* established between the Administrator and the Secretary of Labor.[54]

Collaboration of the Wage and Hour Division and the Department of Justice is dependent upon an obscure provision of the Act relating to the bringing of legal action. Section 11(a) provides in part:

"... the Administrator shall bring all actions under Section 17 to restrain violations of this Act."

Section 4(b) contains, inter alia, the following language:

"Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General."

The meaning of "subject to the direction and control of the Attorney General," in the light of Section 11(a), is obscure. As a matter of administrative practice a division of function has been arrived at by the Wage and Hour Division and the Department of Justice. The latter, through a Wage and Hour unit of the Anti-Trust Division, especially created for the purposes of litigation under the Act, and at present staffed by thirteen attorneys,[55] is in full charge of criminal prosecution of complaints referred to it by the Wage and Hour Division. Matters of civil injunction are handled exclusively in the lower courts by the Wage and Hour Division.

The Act authorizes the Administrator to utilize the services of state and local agencies in connection with administration and enforcement and to reimburse them for services rendered.[56] Because state inspectors are familiar with industrial problems, and because of the lack of funds to hire and train an adequate number of federal inspectors, reliance, in some measure, must be put in state facilities. Cooperation is

[53] The Bureau of Labor Statistics has been at all times, and continues to be, a fount of information for the Wage and Hour Division. See note 43, *supra*. Data adduced by the Bureau at the legislative hearings indicated the economic importance of the bill. *Hearings on S. 2475*, 309-363. Payroll data essential for wage determination and for other phases of the administration of the Act, particularly in regard to the establishment and functioning of industry committees, have been obtained largely from the Bureau. Matters of economic incidence and economic policy standards are determined largely from data assembled at the Bureau. See Daugherty, *infra*, 406. The Children's Bureau, in addition to administering the provisions relative to child labor, makes investigations and inspections with respect to the employment of minors, and brings legal action to enjoin unlawful child labor practices. §12(b). The Department is required by the Act to furnish, through its bureaus and divisions, the investigations and inspections essential to the gathering of data regarding wages, hours, and other conditions and practices of employment. §11(a).

[54] Wash. Daily News, April 24, 1939, p. 10, col. 1.

[55] (1938) 1 WAGE & HOUR REP. 402.

[56] §11(b).

furthered by forwarding complaints received by the Wage and Hour Division, indicating violation of a state law, to the state and receiving from the state complaints indicating federal violation.[57] Minimum enforcement needs, under present conditions, require reliance upon state experience and facilities. The long-time advantage of too great reliance upon decentralized and non-responsible inspection of interstate commerce by state inspectors may be seriously questioned. That a striking variation exists in the vigor and quality of state inspection and enforcement is well known.[58]

Labor unions play an important part in policing the Act[59] and are destined to play an even greater part. They have not overlooked the importance of the Act for organizational purposes. On October 25, 1938, in a letter addressed by the President of the AFL to all affiliated unions, he stated: "The Wage and Hour law was enacted by Congress mainly as a result of the demand for this legislation by officers and members of the American Federation of Labor."[60] Subsequently, the AFL announced that wage and hour committees had been established in 520 communities and that committees were being established in 300 additional cities for the purpose of facilitating the routing of complaints, the conduct of educational work as to the meaning and purpose of the Act, and precaution against precipitate litigation by employees which might endanger the Act in the courts.[61] The CIO vied for credit, announcing: "The enactment of this law was due in large part to the efforts of the CIO."[62] The CIO established a central complaint bureau.[63]

Trade associations, through trade papers, meetings, and other means, have counseled their members how best to comply with the Act. Avoidance of the law and pressure to amend, rather than evasion, has been the *motif* of trade association advice.[64] As groups, they have urged interpretations which would restrict applicability and have endeavored to avail themselves of the numerous opportunities afforded in the regulations for hearings upon exemptions and definitions.[65] Both unions and trade associations have policed the Act, each active in their respective interests. The movement of interpretation and public information by the Wage and Hour Division, as judged by the first six months of administration and enforcement, may be fairly

[57] From address delivered by Administrator Andrews at the Fifth National Conference on Labor Legislation at Washington, D. C., Nov. 16, 1938.

[58] By April 15, 1939, enabling legislation permitting state labor departments to cooperate with the Wage and Hour Division in the administration and enforcement of the Act and to receive financial reimbursement therefor had been enacted by California, Montana, Oregon, North Carolina, South Carolina and Vermont.

[59] Both the AFL and the CIO have established complaint procedures paralleling the complaint procedure of the Wage and Hour Division. See page 384, *infra*.

[60] Statement in letter enclosing affidavit form on which violations of the Act could be reported, the affidavit to "serve as a basis for the enforcement of the provisions of the Act." *Cf.* (1938) 1 WAGE & HOUR REP. 68.

[61] *Ibid.*

[62] *Your Rights Under the Federal Wage-Hour Laws*, CIO, Publication No. 29, April, 1939, p. 2.

[63] No local wage and hour groups were established by the CIO. TWOC, a CIO agency, established a Wage and Hour Bureau to render advice upon complaints and to forward such complaints to the Wage and Hour Division when justified. *Op. cit. supra*, note 62; *cf.* (1938) 1 WAGE & HOUR REP. 67. In April 1939, the TWOC bureau became the official Wage and Hour clearing house for CIO organizations.

[64] *Cf.* (1938) 1 WAGE & HOUR REP. 403-404. [65] See pp. 380-381, *infra*.

interpreted to be in the direction of conciliation and assuasion of trade association and other employer groups.[66]

Enforcement, as a phase of the administrative process, commences first with clarification of the meaning of legislation.[67] Apart from the serious limitation placed upon administration and enforcement by the restricted appropriations of an economy-minded Congress, perhaps the outstanding difficulty, from the point of view of employer compliance, has been the lack of an administrative rule-making power. The multifold and multiform activities of American industry inevitably necessitated numerous specific administrative rulings as to applicability and construction of the statute. Questions of interpretation were, and are, numerous and vexatious. Because the actualities of economics are neither state nor federal, the motivation of industrial organization and form cannot, in most cases, be laid to an adjustment to the latest interstate categories established by the Supreme Court of the United States. In the circumstances of the passage of the Act, industry was sensitized to wages and hours in terms of specific operational problems involved. Trade associations, labor unions, the general and trade press, emphasized the practical effect of the Act upon the operation of business and the compensation of employees. The Wage and Hour Division was immediately flooded with requests stating typical operational factors in given business activities and requesting authoritative rulings as to the applicability of the Act.[68] The hundred-and-twenty-day period between enactment and effective date of the wage, hour and child labor provisions of the Act[69] permitted industry to reflect as to whether or not a particular business was affected and whether readjustments in terms of personnel and price policies ought to be made. In November 1938, the Office of the General Counsel of the Wage and Hour Division commenced the issuance of a series of interpretative bulletins. By early May, 1939, thirteen such bulletins had been issued. As will be seen, these interpretative bulletins are innovations under regulatory acts and have characteristic qualities directed largely to moral suasion of employers.

A rule-making power had been contained in the Act as originally introduced.[70] The issuance of "interpretative bulletins" by the Wage and Hour Division stemmed from the failure of Congress to include a rule-making provision in the Act. The

[66] By May 7, 1939, twenty-six formal released addresses had been delivered by Wage and Hour Division administrative officials to employer groups; two to employee groups.

[67] In contradistinction to such well-established administrative agencies as FTC and ICC, and to such relatively new agencies as NLRB and SEC, all enforcement of the Act is in the courts. The issuance of administrative orders upon cease and desist theory is not permitted by the Act. If such were the case, judicial enforcement, as a general rule, would be by review rather than *de novo*. Every act of enforcement must be litigated under the Act. The Act does not provide for an administrative hearing to determine if there has been violation. *Cf.* §1(c) of the Agricultural Marketing Agreement Act of 1937, reenacting §8a(7) of the Agricultural Adjustment Act, as amended. Investigation must therefore be catch-as-catch can; hence the complaint and inspection policy of the Wage and Hour Division. See page 384, *infra*.

[68] Testimony of the Administrator: "When I arrived on the job there were about 10 or 11 thousand letters, and they are still coming in at about 7,000 a week." *Hearings on Deficiency Bill*, 92.

[69] §§6(b), 7(d), 12(a).

[70] §16. This provision was broader than a similar rule-making power proposed as amendment to the Act in §4(d), H. R. 5435, 76th Cong., 1st Sess. (1939). See page 389, *infra*.

bulletins were the creature of necessity. The power of the Administrator to issue binding and authoritative regulations is confined to specific provisions of the Act. They are of legal necessity limited in scope. The interpretative bulletins devised by the Wage and Hour Division are self-denying as witnessed by the following typical statement:

". . . interpretations announced by the Administrator, except in certain specific instances where the statute directs the Administrator to make various regulations and definitions, serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties, unless he is directed otherwise by the authoritative rulings of the courts, or unless he shall subsequently decide that a prior interpretation is incorrect."[71]

Rule making so severely restricted is, in view of the industrial need for certainty, meeting Goliath with a sling shot, a romantic but risky business.

The interpretative bulletins are not binding on industry; they are merely legal advice—good, perhaps the best. While industry is advised to comply, if in doubt,[72] the employer is not immune if, in reliance upon an interpretative bulletin, he concludes that the Act is not applicable to him. He may be subsequently prosecuted under Section 16(a), sued by an employee under Section 16(b), or enjoined under Section 17. If, in reliance upon the interpretation, he complies and his competitor does not, and it is judicially established that the interpretation of his competitor was correct and that of the Wage and Hour Division incorrect, he is placed at a material competitive disadvantage assuaged only by his conscience in having relied upon the Wage and Hour Division interpretation. Conscience, under these circumstances, is small compensation in modern, competitive business practice, particularly that of marginal business primarily affected by the Act. The lack of uniformity, the uncertainty, the need for reliance upon advice of private counsel as to whether or not to accept the view of the Wage and Hour Division is, from the point of view of the employer, an obvious lacuna in the enforcement of the Act.[73]

The interpretative bulletins issued by the Office of the General Counsel[74] may be

[71] *Cf.* Interpr. Bull. No. 1, Oct. 12, 1938.

[72] "When in doubt, comply" has been the *motif* of answers by the General Counsel to enquiring employers. See speech by Administrator Andrews before American Association for Labor Legislation, Detroit, Michigan, December 29, 1938; *Cf.* Andrews, *Making the Wage-Hour Law Work* (1939) 29 AM. LAB. LEG. REV. 53, 59.

[73] From the point of view of the employee the advantages of a rule-making power are not apparent. Under the rule-making power proposed (see note 70, *supra*), the employer, if he relies in good faith on the Administrator's interpretation of the law, will be immune from civil suit by an employee. The employer could also disregard the rule and challenge it in the courts. If the employee successfully challenges the rule, the employer would still be immune. See §4(d), H. R. 5435, 76th Cong. 1st Sess. (1939). Much depends on the nature of the rules. The interpretative bulletins have, in general, construed the Act broadly to protect the employee. If the rules should become narrow and restrictive, the employee would not be benefited by a rule-making power. He would be effectively deprived of the benefits of the double indemnity remedy. One may speculate on the relative advantages of a rule-making power to (1) employers and (2) employees where there is (a) a sympathetic administrator and an unsympathetic court; (b) an unsympathetic administrator and a sympathetic court.

[74] As of May 3, 1939, they are as follows: No. 1, General Statement as to the Coverage of the Act; No. 2, Application of the Act to the District of Columbia and Territories and Possessions; No. 3, General Statement as to the Method of Payment under the Act, and the Application of Section 3(m) thereto; No. 4,

best described as legal essays in statutory construction. Except that they do not discuss actual fact situations presented for legal opinion, they are the type of legal discussion customarily prepared by legal staffs of administrative agencies to guide administrative officials in the performance of their statutory duties. Such opinions have little binding effect upon either third persons or courts.[75] They aid in the establishing of administrative practice within the agencies and are given such binding effect as responsible administrative officials allow. The interpretative bulletins state hypothetical rather than actual cases. They attempt to achieve binding effect by persuasive reasoning, simple phrasing, and relative informality. They are based upon legal prophecy as to what the courts will do.

There is no attempt to support analyses by legal citation, although frequent reference is made to the legislative history of the Act. While the bulletins attempt to speak accurately, there is a minimum of technicality. It is apparent that they are designed for laymen as well as lawyers. A continuity is established by cross reference from later to prior bulletins. The bulletins are interesting adventures in legal persuasion. Legal staffs of administrative agencies customarily advise, guide and persuade administrative officials by interpretative writings. Legal staffs also prepare legal writings to persuade themselves of the propriety of contemplated legal action. These bulletins attempt to persuade the public.

In eight different instances in the Act, the Administrator is empowered to prescribe rules and regulations.[76] These mandatory regulatory functions are of two kinds: procedural rules, such as regulations relating to the functioning of industry committees and the keeping of records; substantive rules, implementing and completing broad statutory principles. In connection with regulations upon such compli-

---

Maximum Hours and Overtime Compensation; No. 5, Further Statements as to Coverage of the Act: No. 6, The Scope and Applicability of the Exemptions provided by Section 13(a) of the Act; No. 7, Forestry or Lumber Operations Incident or in Conjunction with Farm Operations; No. 8, Collective Bargaining Agreements under Section 7(b)1 and Section 7(b)2 of the Act; No. 9, The Scope and Applicability of the Exemptions provided by Section 13(b)1 of the Act; No. 10, Farmers' Cooperative Associations under the Act; No. 11, The Scope and Applicability of the Exemptions Provided by Section 13(a)(3) of the Act; No. 12, The Scope and Applicability of the Exemptions Provided by Section 13(a)(5) of the Act; No. 13, Determinations of Hours for Which Employees are Entitled to Compensation under the Act.

[75] Some weight is given by the courts to contemporaneous and practical construction put upon a statute by executive officers if rights have accrued by reason of reliance upon the construction. If the construction is doubtful, it will be usually disregarded. *Quaere* whether the interpretative bulletins fall within the rule. See Studebaker v. Perry, 184 U. S. 258, 268, 269 (1902); *cf.* New Haven R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 402 (1906).

[76] §§3(m), 5(c), 7(b), 7(c), 11(c), 13(a), 14. As of this writing, the regulations are: industry committees, 29 CODE FED. REG., c. 5, pt. 511, 3 FED. REG. 2744 (1938); references hereafter in this note are, first, to the above title and chapter of the *Code of Federal Regulations* and, second, to the *Federal Register;* records to be kept by employers, pt. 516, p. 2533 (1938); employment of apprentices, pt. 521, p. 2483 (1938); employment of learners, pt. 522, p. 2484 (1938); employment of messengers, pt. 523, p. 2485 (1938); employment of handicapped persons, pt. 524, p. 2485, amended Jan. 31, 1939, 4 FED. REG. 485 (1939) and March 22, 1939, *id.* at 1342; industries of a seasonal nature, pt. 526, p. 2534 (1938), amended, Dec. 20, 1938, 3 *id.* at 3127; reasonable cost of board, lodging, and other facilities, pt. 531, p. 2535 (1938); defining the term "area of production," pt. 536, p. 2536 (1938), amended Dec. 24, 1938, *id.* at 3072 and Feb. 23, 1939, 4 *id.* at 1009 (1939); defining and delimiting the terms "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman," pt. 541, p. 2518 (1938).

cated matters as determination of "reasonable cost" or definitions of "seasonal nature" or "area of production," administrative devices have been designed to permit adequate application of general legislative concepts to particular situations, to substitute pedestrian fact finding hearings for dispositive administrative formulations. Legally, the Administrator could, within his discretion, prepare and issue definitive regulations binding without recourse, except in the courts, upon the persons involved. An examination of the regulations shows that the method adopted has been open and flexible, relying heavily upon a continuous hearing procedure not required by law, but effectuating the administrative policy that regulatory definition be slow and cautious where economic effect is unmeasured.

With one exception,[77] employers and others affected are afforded an opportunity to petition the Administrator to revise the terms of the regulations.[78] An opportunity is afforded to prepare a written statement setting forth changes and the reasons for such changes. If reasonable cause is set forth, the Administrator will, after notice, schedule a hearing. Upon findings made at the hearing, the regulations may be revised. An instance of such revision was a favorable action upon the petition of The Cigar Manufacturers Association of America, Inc., *et al.*, as to the regulations defining "area of production."[79] A petition to revise the regulations applicable to the employment of messengers was, on the other hand, refused after a hearing asked by a number of telegraph companies.[80] Like the interpretative bulletins, the administrative policy of hearings to amend regulations upon petition of private persons, is a departure from the customary practice of administrative agencies.

Another outstanding procedural device employed in the regulations is review by the Administrator of the action of his authorized representative.[81] In the event that the Administrator has authorized a representative to preside at a hearing of a matter pertaining, for example, to the granting or denial of a certificate of employment of an apprentice, a learner, or a handicapped worker[82] (certificates which would permit the employment of persons at substandard wages), a type of administrative appeal is available at which the Administrator in person presides.[83] Two full hearings are made available unless the petition for review is denied.[84]

Variations are found in the administrative procedure contained in the regulations. The procedure is adjusted to the particular needs of the regulation. In the regulations

[77] 29 CODE FED. REG. c. 5, pt. 526, 3 FED. REG. 2534 (1938).

[78] A typical provision (§536.3, 29 CODE FED. REG., c. 5, pt. 536, 3 FED. REG. 2536 (1938)): "Any interested person or association wishing a revision of the foregoing regulations may make application to the Administrator in writing to amend . . . by increasing or decreasing the maximum of employees permitted with the exemption as defined. If upon petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties or will take other measures for affording interested parties an opportunity to present their view either in support of or in opposition to the proposed changes."

[79] See "Notice of Determination on Petitions by Cigar Manufacturers' Association of America, Inc., and sundry other parties for amendment (In respect to Puerto Rico Cigar Leaf Tobacco) of Section 536.2 of Regulations, Part 536, Defining 'Area of Production' (as used in section 13(a)(10) of the Fair Labor Standards Act)." 3 FED. REG. 2778 (1938).

[80] (1938) I WAGE & HOUR REP. 377-379.

[81] Typical: §524.9, 29 CODE FED. REG. c. 5, pt. 524, 3 FED. REG. 2485 (1938).

[82] *Ibid.*

[83] *Ibid.*

[84] *Ibid.*

pertaining to determination of reasonable cost of board, lodging and other facilities,[85] for example, hearings may be had either upon notice by the Administrator or his duly authorized representative, upon the application of employees, or groups of employees, or upon the application of the employer for the purpose of making particular determinations as to any given employer.[86] A general determination of "reasonable cost" under Section 3(m) of the Act is provided in the regulations.[87] A new type of notice is provided: notice from employer to employee. The hearing place is fixed near the employer's business.

In certain hearings, the regulations relate to the bringing in of witnesses by the Administrator and to matters of burden of proof. As to the latter, in the regulations applicable to the employment of messengers,[88] there is a burden of proof placed upon the applicant to show that application of the minimum wage to messengers will result in curtailment of employment opportunities.

In the case of regulations applicable to industries of a "seasonal nature,"[89] an interesting administrative procedure has been devised. If, at the hearing, the Administrator or his authorized representative makes a preliminary determination that the applicant has established a *prima facie* case for the granting of an exemption and such *prima facie* case has not been opposed, the preliminary determination is published in the *Federal Register*. For fifteen days after publication, the Administrator stands ready to receive objection to the granting of an exemption. If such objections are received, together with a request for hearing, the matter will be set for hearing. If no objection is received and there is no request for a hearing, a finding on the *prima facie* case is made and the exemption becomes effective upon publication of the finding in the *Federal Register*.[90]

The manner of conducting hearings and the basis of determining findings are not formally prescribed. A species of administrative due process has been devised to meet the exigencies of the hearings.[91] In the conduct of hearings by the Hearing and Exemption Section, for example, attorneys for applicants appear as witnesses, not as special pleaders. A member of the administrative staff acts as presiding officer, with the assistance of such economic, legal and enforcement experts as are deemed necessary. Cross examination is not permitted; but questions may be asked through the presiding officer. A full transcript of the proceedings is taken. The experts introduce their own statements in the record and participate in the questioning. The rules of evidence do not apply. The presiding officer makes his findings on what he believes to be material. Briefs may be filed.

The basis for determining findings is empiric, growing out of the purpose of the hearing and the purport of the testimony. In the first formal hearing by the Hearing

[85] 29 CODE FED. REG. c. 5, pt. 531, 3 FED. REG. 2535 (1938).
[86] *Id.* §531.2.
[87] *Id.* §531.1.
[88] *Cf.* §§522.7, 523.7, 29 CODE FED. REG. c. 5, pt. 522, 3 FED. REG. 2484, 2485 (1938).
[89] 29 CODE FED. REG. c. 5, pt. 526, 3 FED. REG. 2534 (1938) (as amended).
[90] *Id.* §526.5.
[91] Based on interview with Chief, Hearings and Exemption Section, Wage and Hour Division; *cf.* (1938) 1 WAGE & HOUR REP. 66; *id.* at 382; 2 *id.* at 42.

and Exemption Section, on an application to employ learners, textile industries petitioned that they be permitted to employ learners on the basis of four per cent of the total employment for a period of nine weeks at 70 per cent of the minimum wage.[92] The criteria administratively prescribed for determining findings were: (a) did the industries already have a class of learner employees; (b) was such a classification necessary; (c) how long did it take a learner to become proficient; (d) what was the present approximate pay of learners; (e) what regulations were needed. The petition was voluntarily withdrawn[93] after the evidence failed to show a need for a learner classification in the industry.

Phrases such as "seasonal nature," "reasonable cost" and "area of production" have no precise content. Mere application of the rules of statutory construction to such phrases could scarcely permit the divergence of definition necessary to comprise the divers industries intended to be regulated. While it is clear that the Administrator could have issued controlling definitions at the outset, he adopted a careful and precise fact finding procedure for meeting the specific problems of specific industries. The value of elaborate hearing procedures is, however, dependent in large measure upon the administrative organization, which, if understaffed, can scarcely afford to divorce from other important activities of administration and enforcement sufficient time and personnel to allow the granting of continuous hearings. A safeguard is contained in that reasonable cause must be set forth[94] and reasonable cause is a matter for the judgment of the Administrator in a manner somewhat parallel to the judicial writ of *certiorari*. There must also be considered the cost to small industries in petitioning for amendments or revisions, or otherwise exercising rights, to have hearings in Washington as contrasted with the relative ease with which larger industries may finance the cost of hearings. Yet the slow, cautious procedure of numerous hearings preliminary to definitive regulation must, in the long run, assure realistic administration.

Problems of detection which have arisen for administrative agencies in the enforcement of unpopular laws have not yet been faced by the Wage and Hour Division. Widespread comment in the press, activity of labor organizations, and the publicity program of the Division itself have brought awareness of new rights to most of the workers affected. As a counterpart to the thousands of letters received from employers by the Division asking for interpretations of the law, thousands of complaints charging violations have been received from employees accusing employers and employers accusing competitors. By March 10, 1939, 10,712 complaints against 9,101 establishments had been received in Washington.[95] A heavy burden has been

[92] Notice of hearing, Nov. 9, 1938; hearing commenced Nov. 28, 1938. (1938) 1 WAGE & HOUR REP. 361-362, 3 FED. REG. 2671 (1938).

[93] (1938) 1 WAGE & HOUR REP. 418. The pressure upon the hearing procedure has been exceedingly heavy. As of April, 1939, there had been over 4,500 applications for exemptions for handicapped workers alone. The Hearing and Exemption Section, with three persons available as presiding officers, had been compelled to make determinations as to validity from the face of the applications. No hearings were held.

[94] *Cf.* §531.3, 29 CODE FED. REG. c. 5, pt. 531, 3 FED. REG. 2535 (1938).

[95] Taken from summary of activities prepared by Wage and Hour Division.

placed upon the Division, so great in view of the shortage of personnel that only 2,715 of these complaints had been analyzed and reviewed by middle April.[96]

In order to facilitate the receipt of complaints, the Wage and Hour Division has prepared a complaint form under strict assurances that information received would be held confidential.[97] The complaint form requests information as to the nature of the business or of the establishment, identification of the complainant and a detailed statement of the exact nature of the conditions complained of. Complaints to Washington are analyzed upon receipt. They are acknowledged and further information required if they are deemed worthy of investigation. Originally, an attempt was made to adjust the matter by correspondence, and correspondence is still attempted in some cases. If correspondence fails, the case is referred to a field office in the area from which the complaint was received. The field office further investigates the charge and forwards to Washington a detailed report for legal action if deemed necessary.[98]

When complaints are referred to field offices they are investigated by inspectors who are under instructions to effect compliance without compulsion. The inspectors may exercise the Federal Trade Commission powers relative to the production of books, papers and documents,[99] and also the specific investigatory powers.[100] The Federal Trade Commission powers have been closely litigated over two decades.[101] Inspectors must, in all instances, keep secret the identity of the complainant.[102] They are instructed not to give interpretations of the Act. They may, however, advise employers as to ways of adjusting bookkeeping to meet the requirements of the records regulation, in pursuance of the policy that cooperation of employers should be sought rather than conviction for violation.

Investigation of complaints may take place in the course of regular inspection of books and records by the investigators, who are instructed not to divulge that complaint is one of the causes of inspection. Discovered violations of the Social Security or other federal or state laws are included in the inspector's report and he is also responsible for obtaining evidence for criminal or civil action. The subpoena power[103] can be utilized only by express authority of the Administrator. In reliance upon the powers granted in Section 11(a) the inspector is specifically authorized to make transcriptions of original records and to question employers. The inspector is

[96] *Ibid.*

[97] U. S. Dept. of Labor, Wage and Hour Division, Form CE-10. See (1938) 1 WAGE & HOUR REP. 291. The question as to whether information, documents or materials thus or otherwise obtained under pledge of confidence should be revealed on subpoena *duces tecum* has been litigated. In *Andrews v. Trelles* (E. D., D. of La.), Federal Judge Borah, on April 6, 1939, quashed such a subpoena *duces tecum* on the ground that an inspector's report was confidential. The liberalized pre-trial federal practice seemed to have no effect on the privilege.

[98] From *Enforcement of the Wage-Hour Law,* address delivered at the Duke University Symposium on Law in Modern Society, Durham, N. C., Dec. 3, 1938, by the Assistant Administrator in Charge of Cooperation and Enforcement, Wage and Hour Division.

[99] §§9 and 10 of the Federal Trade Commission Act of Sept. 16, 1914, as amended, are incorporated by reference in §9 of the Act.

[100] §11(c).

[101] See, *inter alia,* Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 COL. L. REV. 708 and 905.

[102] Information as to inspectors based on interview at Wage and Hour Division.

[103] §9.

not limited to investigating the records and plant of the employer but may make necessary inspection of the records of trucking companies and railroads which may have transported the goods of the employer involved.

In the initial stages of the administration and enforcement of the Act, it is probably true that the actual responsibility for complete enforcement rests with employees and labor unions. The limited appropriations available to the Wage and Hour Division make it essential that adequate machinery for the policing of the minimum standards be set up by the employees intended to be benefited. This was quickly recognized by the AFL and the CIO. Detailed interpretative bulletins were prepared explaining the rights conferred upon the employees and, in certain instances, attempting to interpret and construe the provisions of the law.[104] The interpretative bulletins of the labor organizations have not always reached the same conclusions as the Office of the General Counsel of the Wage and Hour Division.[105] Complaint forms have been prepared by both labor organizations. The CIO cautioned employees that "until the constitutionality of the law has been established *in a suit brought by the Government,* caution should be exercised in starting suits for damages on behalf of the workers. Such a suit should be brought only in clear cases, and then only after consultation with the legal department of the Congress of Industrial Organizations, or the ACWA-TWOC Wage-Hour Bureau."[106] (Italics supplied.) The CIO also noted: "Workers can get the added protection of the National Labor Relations Act if, in making their complaint, they do so through the union. Any discharge on account of such complaint would then become a discharge on account of union activity."[107] The AFL warned its members: "Do not run the risk of playing into the hands of those who will try to block or circumvent the law. Be sure to consult with us before taking action."[108] In devising complaint forms, the AFL adopted a brief affidavit form providing for sworn information as to various aspects of the employer's business and of the employment relationship.[109] The CIO prepared two complaint forms providing for unsworn information and for detailed facts.[110]

There are three types of court action available to enforce the Act: Criminal prosecution,[111] civil injunction,[112] and civil suit by employees or their representatives for double indemnity for unpaid compensation.[113] Settlements, consent decrees, pleas of guilty with suspension of sentence upon restitution, have been favored as enforcement policy.[114] The national unions have been reticent in recommending or further-

[104] *Cf. Overtime Pay under the Wage and Hour Law,* Explanatory Bulletin No. 7A, AFL (Dec. 1938).

[105] *Id.* at 4.

[106] *Your Rights under the Federal Wage-Hour Law,* Publication No. 29, CIO (April, 1939) 15.

[107] *Id.* at 16. CIO pecan workers on May 30, 1939 started to picket two plants allegedly in constant violation of the Act. The CIO News, May 22, 1939, p. 7, col. 2.

[108] (1938) 1 WAGE & HOUR REP. 67. [109] *Ibid.*

[110] *Complaint of Violations of Federal Wage-Hour Law,* CIO.

[111] §16(a). [112] §17. [113] §16(a).

[114] As of May 8, 1939, the Government had taken court action in twenty-two cases, sixteen of which were suits to enjoin employers from violating the provisions of the Act, the remainder criminal prosecutions under the penal provisions. The civil suits were brought by attorneys for the Wage and Hour Division on behalf of the Administrator as party plaintiff; criminal actions were, of course, brought on

ing employee suits.[115] As enforcement policy, it was deemed desirable that the constitutional issue, when raised, be on the strongest case. The Government is not a party to employee suits,[116] but there is reason to believe that, in the beginning, the Wage and Hour Division discouraged labor union enforcement by civil suit.[117]

The offenses prescribed by the Act seem adequately defined.[118] Outright prohibitions are provided against violation of the minimum wage or maximum hour sections, or of the provisions of any regulation or order of the Administrator relating to the exemption for learners, apprentices, messengers, and handicapped workers.[119] It is not apparent why the prohibition was not extended to all regulations or orders of the Administrator. One of the proposed amendments to the Act would remedy this failure.[120] The discharge of, or discrimination against, an employee because of

---

behalf of the United States. The first civil action was brought in the Federal District Court for the Eastern District of North Carolina on January 27, 1939, three months after the effective date of the wage and hour provisions of the Act. A consent decree was signed February 23, 1939, in which the company agreed to observe all provisions of the Act. Consent decrees were also obtained in eleven other instances in the lower Federal courts. The consent decrees provided, in one instance, for the restitution to employees of more than $2,200 and an agreement to comply with the Act in the future; in another instance, for payment of no less than minimum wages in the future; in a third instance, for immediate conformance to the provision of the Act and the regulations thereunder and restitution of wages due for the period of noncompliance. Pending civil suits in the Federal district courts allege a variety of violations based, for the most part, upon Sections 6 and 7 of the Act. In only one instance had announcement been made that the employer would contest the constitutionality but, to date, matters of constitutionality have not been litigated.

The six criminal proceedings were brought by the Department of Justice. In four instances the defendants entered pleas of guilty; one, not guilty; one, not yet arraigned. Charges alleged pertained, usually, to violations of Section 6, falsification of records, transportation of goods in interstate commerce manufactured in violation of the Act, and failure to keep proper records of employment. The basis of the choice of criminal prosecution rather than injunction seems to have been, if the first six prosecutions are to be taken as evidence of policy, the actual falsification of records as distinguished from the failure to keep records, and the flagrantly wilful transportation in interstate commerce of goods knowingly produced at less than the minimum wage. On pleas of guilty the defendants, in one instance, were fined $1,000 on each count, with suspended sentence in all but one of the counts, after promise that restitution to employees would be made; in another instance, $6,000 of an $8,000 fine imposed was suspended on the promise of the defendant to make restitution; in a third instance, fines of $1,000 upon the company and $250 each upon the officers were entered. In a fourth case involving a five-count indictment followed by a plea of guilty, fines of $3,000 were imposed on each count, of which $12,000 was suspended upon stipulation that restitution totalling approximately $1,700 would be made to employees. The defendant was placed on probation for three months, during which restitution was to be made.

Files of the NRA Records Section, U. S. Department of Commerce, show that at least six of the violators sued or prosecuted had long records of complaints of violation of wage and hour standards under NRA codes.

[115] An examination of newspaper reports indicates that as of April 15, 1939, some twenty-five civil employee suits had been filed in various parts of the country, many without prior knowledge of national unions.

[116] The United States may, of course, intervene as a defendant if the constitutionality of the Act is involved. 50 STAT. 751 (1937), 28 U. S. C. §401 (Supp. IV, 1938).

[117] "At a press conference, Mr. Andrews announced that he had received assurances from leaders of both AFL and CIO unions that they would attempt to dissuade their members from hasty court actions against employers." (1938) 1 WAGE & HOUR REP. 1. Indications are that this policy has changed with *Mulford v. Smith*, decided by the Supreme Court of the United States on April 17, 1939, sustaining penal provisions upon the movement of goods in interstate commerce under quotas fixed pursuant to the Agricultural Adjustment Act of 1938. This decision is believed to place the Act on a "firm constitutional basis." (Statement by Associate General Counsel of Wage and Hour Division at press conference, April 11, 1939.)

[118] §15.

[119] §15(a)(2).

[120] See *infra* note 145.

the filing of a complaint or other like behavior is made an offense.[121] Violation of the records provision, or the making or keeping of false records, is prohibited.[122] A "hot goods" clause prohibits the transportation, movement or sale of goods in interstate commerce, knowing such goods to have been produced in violation of the labor standards, or in violation of a regulation or order of the Administrator relating to learners, apprentices, messengers and handicapped workers.[123] The latter provision is designed to avoid the competitive advantage which an employer purchasing or obtaining goods already made, may obtain over an employer producing goods for sale; but seems defective for enforcement purposes in that there is no express provision that the burden of proof that the owner had no knowledge of the violation of the law at the time he received the goods be upon such owner. Nevertheless, purchasers are loath to assume the risk of goods being "hot."[124] On the whole, it is premature to judge the effectiveness of the offenses prescribed in view of the paucity of litigation thus far.

The remedies available have been partially detailed in connection with the discussion of the roles played by various agencies in connection with the enforcement of the Act. It is worthy of note that Section 18 contains language relative to compliance which has aroused considerable debate. Section 18 provides in part:

". . . No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify an employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act."

There is no language making this clause specifically enforceable. The word "justify" carries no legal sanctions. Yet, it is apparent that language of Congress should not be construed to be meaningless. It remains to be seen whether an injunction proceeding could allege, as a count, the provision of Section 18 and attempt to enforce against the employer restraint against lowering his wages or increasing his hours within and not below the minimum and maximum provisions of the Act. In the case of maximum hours, the overtime compensation provision of Section 7(a) is based upon "the regular rate" of employment. "Regular rate" may possibly be construed to include regular number of hours. This would furnish an approach alternative to Section 18.

Employee suit for double indemnity[125] is potentially the most important penal provision of the Act.[126] The provision lacks, however, an element contained in the

[121] §15(a)(3).

[122] §15(a)(5).

[123] §15(a)(1). The *prima facie* evidence proviso of subsection (b) is effective but seems narrow in scope. The "hot goods" provision has been invoked a number of times, the proceedings culminating in consent decrees permanently prohibiting shipment of specified goods out of the state.

[124] Especially is this true in a buyer's market where more than one manufacturer competes for the wholesaler's business. *Quaere* whether filing of suit by the Administrator or by an employee, or criminal charges by the Department of Justice, against a manufacturer is constructive notice to the prospective purchaser that the manufacturer's goods are "hot" within the "knowledge" proviso of §15(a)(1).

[125] §16(b).

[126] The employee may file individually or for a class, or through a representative, in any court of competent jurisdiction (which presumably includes state courts). The employee has a claim until the Statute of Limitations expires. He may wait until he ceases to be an employee and file, if he is loath to file suit against his employer while still employed. Double damages, plus reasonable attorney's fees, plus

National Labor Relations Act designed to assure immediate relief. Suits brought in the federal courts by the National Labor Relations Board to enforce its orders are by law given precedence over all other suits on the docket.[127] A like provision is not contained in the double indemnity provision of the Act. It may be questioned whether an amendment to the Act providing precedence for employee suits would prove effective. Criticism of the National Labor Relations Act provision has been made on the ground that actual experience has not proven that quick determinations are made.[128] Possibility of delay is not removed. The National Labor Relations Board has had, in certain instances, to wait from one to two years for determination of suits.[129]

It is also premature to judge the probable effectiveness of the penal provisions in assuring compliance with the law. The large number of consent decrees and pleas of guilty may be attributed to two factors: First, the Act, in view of the latest decisions of the Supreme Court, seems on relatively sound constitutional ground,[130] and the risk of litigating the constitutionality is not quickly assumed by employers; second, fines imposed by the judges who have presided in the criminal cases are heavy.[131] The strict penal provisions seem not unjustified in view of the relatively low labor standards required by the Act.

Enough policy formulation has appeared in the administration and enforcement of the Act[131a] to permit an evaluation of preliminary public opinion. Without confusing public opinion and newspaper reaction, it is important, in connection with the Act, to consult editorial opinion. A predominantly anti-New Deal press has reacted consistently in its condemnation of the administration and enforcement of the companion National Labor Relations Act. The same press has praised, with virtual unanimity, the administration and enforcement of the Fair Labor Standards Act, and often, where opposed to wage and hour legislation, has been careful to support the Administrator. It may be noted, also, that the press has objected strenuously to certain provisions of the Act and the Administrator has recommended amendments to meet the objections. Four hundred and twenty-eight newspapers in the United

---

costs of the action, is, like the triple damage feature of the Sherman Anti-Trust Law, effective because costly.

[127] Section 10(i) of the National Labor Relations Act provides that petitions filed in any Circuit Court of Appeals by the Board or a party "shall be heard expeditiously and if possible within ten days after they have been docketed."

[128] *Cf.* Wolf, *Administrative Procedure Before the National Labor Relations Board* (1938) 5 U. OF CHI. L. REV. 358.

[129] *Id.* at 380.

[130] The constitutional issues raised by the Act are discussed elsewhere in this issue. See note 117, *supra.*

[131] See note 114, *supra.*

[131a] The Administrator has expressed his basic policy as to administration and enforcement of the Act as being "the principle of gradualness." Andrews, *Making the Wage-Hour Law Work* (1939) 29 AM. LAB. LEG. REV. 53. "As with many other economic problems successful treatment depends very largely upon correct timing. While the actual employment of equal numbers at higher wages and shorter hours would be bound to have a beneficial effect on our national economy, the essential question is how rapidly this object can be attempted. Every payment to labor represents at once a source of purchasing power and an element of cost. Purchasing power can be expanded if the increase in labor cost is applied with sufficient gradualness to prevent serious economic dislocation. This principle of gradualness is essential to any important reform of labor conditions, and is the more essential when power is exercised, as it should be, over the entire national economy at one time." *Id.* at 58. *Cf.* notes 5 and 151, *supra.*

States were examined by the writer for the period January 1, 1939 to April 15, 1939, for the purpose of evaluating editorial reaction to the administration and enforcement of the Act. Two hundred forty-six editorials on wage and hour administration and enforcement appeared. Of 85 editorials which commented upon the policies, methods and competence of the Administrator, 76 were favorable and 9 were unfavorable.[132] Thirty-six editorials were unfavorable to the overtime provisions, the largest and most vigorous single item of attack upon the Act. Of 66 editorials which commented upon the Act in general, its philosophy, or its effect upon the national economy, 34 were unfavorable to the Act and 32 noncommittal or partially favorable. On the press returns, the Administrator has scored a startling personal victory over the Fair Labor Standards Act.

As the 76th Congress moves on, the Committee on Labor of the House of Representatives, at the time of this writing, has reported favorably a series of amendments to the Act.[133] Designed to obviate such employer criticism as there has been of the administration and enforcement of the Act, the amendments, for the most part, restrict the applicability of the legislation. Most of the proposed amendments are supported, in substance, by the Administrator.[134] As to some 16 categories of agricultural processing, one and one-half times the regular rate for overtime would be restricted to employment in excess of 60 hours in any work-week,[135] or completely eliminated for not more than 14 work-weeks in any calendar year. Automatic application of the Act to Puerto Rico and the Virgin Islands would be superseded under an all-industries committee authorized to fix minimum wages at lower than 25 cents an hour.[136] The rule-making power contained in the original bill, and not enacted, would be revived and, with certain changes, included in the Act.[137] The overtime provision would not apply to employees on a guaranteed monthly basis of $200 or more.[138] Switchboard operators employed in a public telephone exchange with less than five hundred stations,[139] employees employed in the ginning of cotton,[140] and other processing employees,[141] would be totally exempt. Exemption would be further broadened by including an hour's exemption for employees of refrigerator car companies, etc.[142] Pressure to exempt telegraph messengers[143] and

[132] Unfavorable to the Administrator: Chicago Daily News, Jan. 7, 1939; Macon (Ga.) Telegraph, Jan. 9, 1939; Beaumont (Tex.) Enterprise, Jan. 11, 1939; Johnstown (Pa.) Democrat, Jan. 14, 1939; Montgomery (Ala.) Advertiser, Feb. 6, 1939; St. Joseph (Mo.) Gazette, Feb. 17, 1939; Baltimore Evening Sun, March 17, 1939; Chicago Journal of Commerce, April 8, 1939; Richmond Times-Dispatch, April 10, 1939.

[133] H. R. 5435, 76th Cong., 1st Sess. (1939).

[134] "Section 4(d) of the Fair Labor Standards Act of 1938, requires that the Administrator submit annually a report on activities for the preceding year and including such recommendations for further legislation in connection with minimum wage and maximum hour legislation, as in his opinion are desirable. Acting in accordance under this requirement the Administrator did, in January of this year, submit his report to Congress, together with suggestions for amendments to the Act which, in his opinion, were necessary to relieve hardship found to exist and to make the administration of the Act more effective. These suggestions were incorporated in the bill (H. R. 5436) introduced by the chairman of the committee and have been fully considered by the committee. All of them are carried in the committee amendment but not all in the form recommended by the Administrator." REP. No. 522, to accompany H. R. 5435, 76th Cong., 1st Sess. (1939) 5.

[135] *Id.* §3.

[136] *Id.* §1.

[137] *Id.* §4. See note 73, *supra.*

[138] *Id.* §5.

[139] *Ibid.*

[140] *Ibid.*

[141] *Ibid.*

[142] *Id.* §6.

[143] *Id.* §7.

homeworkers in rural areas[144] is reflected in proposed amendments to permit the Administrator to issue regulations or orders providing for employment at lower than the minimum wage, but not less than 25 cents an hour in the case of messengers. Enforcement would be strengthened by extending the prohibition against violation of the regulations, now limited to regulations relative to learners, apprentices, messengers, and handicapped workers, to all regulations.[145] Enforcement would be curtailed by a provision exempting from the "hot goods" prohibition persons having no knowledge or reason to believe that, at the time of acquiring a "property interest" therein, they were in fact "hot goods."[146] A procedural amendment contains a venue provision permitting the serving of process and the bringing of suit wherever the "defendant may be found" or "is an inhabitant or transacts business"[147] and would preclude assessment of costs against the Administrator in any proceeding under the Act.[148] The transportation of prison labor goods in interstate commerce would be forbidden.[149]

The proposed amendments are, in the judgment of the CIO, in practically every case "for the benefit of the employers" constituting

> "an attempt to meet claimed cases of hardship on the part of employers. There is no attempt made by these amendments to strengthen certain provisions of the Wage Hour law necessary to secure for the workers the protection which the law purportedly confers upon them."[150]

In no instance do they meet the following labor objections to the Act:[151]

> the too low initial minimum wage rate of twenty-five cents an hour; the too high initial maximum weekly forty-four hour level; the absence of a daily limitation on the hours of work; the absence of a specific and enforceable provision that the same weekly wage be maintained when weekly hours are shortened; the vague and confused language of Section 7(b) relating to maximum hours under collective bargaining agreements; the numerous, unjustified exemptions under Section 7(c); the permission to employ apprentices, learners and messengers at substandard minimum wages, contained in Section 14; the authorization to industry committees to establish wage classifications within an industry; the absolute discretion left to the Administrator to disapprove recommendations of industry committees under Section 8(d); the absence of language which would give precedence to employees' suits for back wages and otherwise to expedite such suits; the failure to make specifically enforceable the provisions of Section 18 that no provision of the Act shall "justify" an employer in reducing a wage paid by him or in increasing hours of employment maintained by him.

[144] *Ibid.* [145] *Id.* §8. [146] *Ibid.*
[147] *Id.* §11. [148] *Ibid.* [149] *Id.* §12.
[150] (1939) 2 WAGE & HOUR REP. 183.
[151] See address delivered by Boris Shishkin, Economist, American Federation of Labor, before annual meeting of the American Association for Labor Legislation, Detroit, Michigan, Dec. 29, 1938. (1939) 2 WAGE & HOUR REP. 5 and *Wage-Hour Law Administration from Labor's Viewpoint* (1939) 29 AM. LAB. LEGIS. REV. 63, 65. "At the end of six months of practical administration of the Act it may be fair to summarize Labor's view that the administration of the law has shown overanxiety about employers' welfare and relative inattention to expressions of the workers' real needs." *Id.* at 64; *cf.* notes 131a and 5, *supra.*

THE CHILD LABOR PROVISIONS OF THE FAIR LABOR STANDARDS ACT

KATHARINE DU PRE LUMPKIN*

On five occasions Congress has attempted to bring federal regulation to bear on the child labor problem. The Owen-Keating Law of 1916 prohibited the shipment in interstate commerce of goods on which the labor of children under 14 years of age had been employed within 30 days, or the labor of children between 14 and 16 more than 8 hours a day. The law, admirably administered by the Children's Bureau of the United States Department of Labor, was in effect only nine months, between September, 1917, when it became operative, and June, 1918, when the Supreme Court by a five-to-four decision affirmed a district court ruling declaring it unconstitutional.[1] There followed the Federal Child Labor Tax Law of 1919, administered by the Treasury Department. It remained in force somewhat longer than the first act. But on May 15, 1922, it too was invalidated by a decision of the Supreme Court.[2]

Still another mode of regulation was attempted in 1933, under the National Industrial Recovery Act. Most of the codes of fair competition were drawn to include a clause prohibiting child labor under 16. Estimates have it that between 75,000 and 100,000 child laborers were withdrawn from industry under the codes. When there came the Supreme Court's decision abrogating the N.I.R.A. in 1935, this form of child labor regulation likewise disappeared.[3]

Meantime, confronted by the difficulty of drawing a federal law within the constitutional interpretations given by the Supreme Court, Congress in 1924 had passed the Child Labor Amendment. Its adoption would remove all question of Congressional power to legislate on this pressing social problem. Ratifications of the Amendment were relatively few until the economic crisis of 1929, throwing millions of adult wage earners out of employment, brought sharply to public attention the absurdity of permitting child labor when widespread unemployment was a recurring phenomenon. In quick succession a number of states ratified the amendment, until by 1937 the total had reached 28, only eight short of the required number.

* A.B., 1915, Brenau College; M.A., 1919, Columbia University; Ph.D., 1928, University of Wisconsin. Director of Research, Council of Industrial Studies, Smith College, since 1932. Co-author, with Dorothy W. Douglas, *Child Workers in America* (1937); author, *Shutdowns in the Connecticut Valley* (1935), and *The Family: A Study of Member Roles* (1933). Contributor to journals on social and economic subjects.

[1] Hammer v. Dagenhart, 247 U. S. 251 (1918).

[2] Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922). See 1 ABBOTT, THE CHILD AND THE STATE (1938) 483-525.

[3] *Id.* at 557-559.

The chances of rapidly bringing the campaign to a successful conclusion seemed bright. But the Child Labor Amendment also was thrown upon the lap of the Supreme Court by actions in Kentucky and Kansas.[4] Legislative ratification in both states was challenged on the score that the legislatures had previously rejected the amendment; and in any case, it was claimed, ratification had not taken place within a reasonable period after Congressional enactment. The Kansas Supreme Court held that ratification by the Kansas legislature was valid, while Kentucky's highest court took the opposite view. Both cases were appealed to the United States Supreme Court where they were argued in October, 1938. On June 5, 1939 the Court rendered a decision upholding the validity of the ratifications.

The latest attempt by Congress to regulate child labor got under way in 1937. For a time it seemed probable that a law might be passed dealing specifically with the problem. Child labor measures—of very unequal merit, to be sure,—were introduced in both Senate and House. What finally eventuated was the inclusion of child labor provisions in the pending Fair Labor Standards Act. These provisions have now been operative since October 24, 1938.

STATUTORY PROVISIONS

The portions of the Fair Labor Standards Act dealing specifically with child labor are Sections 3(l), defining what constitutes "oppressive child labor," 12(a), prohibiting oppressive child labor, 12(b) vesting administration and enforcement of the child labor provisions in the Children's Bureau, and 13(c) exempting certain classes of child labor which otherwise would come under the Act. The Act being based upon the power of Congress to regulate interstate and foreign commerce, only child laborers who are engaged in interstate industries are affected by its terms.

According to Section 3(l), it is "oppressive child labor" when a minor under the age of 16 years is employed, unless the employer is the child's parent or guardian, and even a parent or guardian may not employ the child in manufacturing or mining occupations. For children under 16 years manufacturing and mining are banned in all circumstances. Children of 14 and 15 employed in non-mining and non-manufacturing occupations are not deemed to be employed at oppressive child labor, if the Chief of the Children's Bureau determines that such occupations do not interfere with the child's schooling or impair his health and well-being. Minors between the ages of 16 and 18 are considered engaged in oppressive child-labor occupations if such occupations have been designated by the Chief of the Children's Bureau as hazardous. It is provided that employers may secure age certificates issued under the authority of the Children's Bureau, showing that minors in their employ are "above the oppressive child-labor age."

Section 12(a) declares that "no producer, manufacturer or dealer" is permitted to send into interstate commerce "any goods produced in an establishment in the United States in or about which within thirty days prior to the removal of such goods

[4] Wise v. Chandler, 270 Ky. 1, 108 S. W. (2d) 1024 (1937); Coleman v. Miller, 146 Kans. 390, 71 P. (2d) 518 (1937). The decisions of the Supreme Court in these two cases are found in 59 Sup. Ct. 992 and 973, respectively. See ABBOTT, *op. cit. supra* note 2, at 468-469.

therefrom any oppressive child labor had been employed."[5] Already, as we shall see, interpretations of this clause have been rendered by the Solicitor of the Department of Labor restricting its application to some extent.

There are several general exemptions from the Act. Besides the clause in Section 3(l) exempting children working for parent or guardian, Section 13(c) exempts children employed in agriculture "while not legally required to attend school," and also children employed as actors in motion pictures or theatrical productions. These exemptions are in addition to the sweeping exclusion of child laborers engaged in occupations other than those producing for interstate commerce.

It is specifically provided in Section 12(b) that the Children's Bureau, beside being responsible for general administration of the child labor provisions, shall be responsible where minors are concerned for making investigations and inspections as provided in Section 11, and also shall bring actions under Section 17, which provides for injunction proceedings, the latter, as is customary, under the direction of the Attorney General. In addition, Section 11(b) provides for cooperation with state and local agencies on the part of the Children's Bureau in carrying out the purposes of the child labor provisions. Penalties (Section 16) are the same for all convictions under the Act, namely, a fine of not more than $10,000 and/or imprisonment for not more than six months, with the additional proviso in Section 12(a), the child labor section, against the institution of a second prosecution while one is already pending.

Such in brief are the provisions of the Act touching child labor. From this point our inquiry turns upon the question, How adequate is the law to regulate child labor? For one thing, how adequate are its provisions for enforcement? Weak enforcement, we know, can in effect nullify social legislation. Secondly, to what extent does the law really cover the problem of child labor?

ADMINISTRATION

When the Fair Labor Standards Act placed administration of the child labor provisions in the hands of the Children's Bureau it brought a great sense of relief to all who were concerned to see competent, unbiased enforcement in a spirit of public service. Obviously, this was the administrative arrangement that should be made. Hardly had the measure become law when the Bureau was able to set in motion the machinery for implementing the child labor provisions. Behind it was the valuable experience of administering the 1916 law, the principal features of which were similar to the 1938 Act. Also its staff of experts were able to draw upon their first-hand knowledge of new practices as these had developed in the several states during the past twenty years. Responsibility for administration was allocated to the Industrial Division of the Bureau, enlarged to care for the new law. An Assistant Director in Charge of Child Labor Administration was appointed.

It is to be noted from the outset that the basic elements for effective administration are contained in the child labor provisions of the Act. In building its adminis-

[5] Section 3(j) of the Act defines "produced" to mean when an employee "was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods. . . ."

trative structure around the framework thus provided, the Bureau saw its work falling into four categories.[6] It must make provision for issuing age certificates. It has long been recognized that a system of age certification is essential to enforcement of child labor laws. While section 3(l) of the Act differs from most state laws in that employers are not required to have on file certificates of age for all minors employed, it is plainly to their advantage to do so, as a protection against unwitting violation of the law. The Children's Bureau is required to make available such certificates, and we may assume that most employers will avail themselves of the protection the provision affords.

The Bureau must also make inspections for purposes of enforcement. There can be no real enforcement of labor laws unless the public agency has the power to inspect establishments and is furnished funds to employ inspectors. One of the devices sometimes resorted to in the early years of state child labor legislation, if a law could not be defeated by its opponents, was to strip it of enforcement machinery. The Fair Labor Standards Act was careful to make provision for inspection and inspectors.

The other two fields of child labor administration involve extended investigation as a preliminary step. Investigation must precede determination of the hazardous occupations from which boys and girls between 16 and 18 years should be barred; also the determination of certain aspects of employment conditions in non-mining and non-manufacturing occupations for boys and girls of 14 and 15.

In the Bureau's own words, it has taken as the keynote of its administration of the Act the strengthening of state services through federal-state cooperation.[7] It is hard to see how enforcement could be successful without this. Not only does it prevent duplication, and hence make for efficient service; it spells the difference between insufficient staff, which would certainly be the case if the Bureau had to depend largely upon its own budget, and the fairly adequate service made possible through collaboration with state child welfare staffs.

A first step of the Bureau was to enlist the aid of state agencies in the issuance of temporary certificates of age. The standards set down in Regulation Number 1 are those commonly observed by the better state administrations. They turn in the first place upon what shall constitute proof of age. According to this regulation, proof of age should, whenever possible, be based upon a birth certificate or official transcript issued by an officer charged with the duty of recording births. Other evidence of age may not be accepted by an officer issuing certificates according to federal standards unless proof is furnished that an official birth certificate cannot be provided. In the latter case other evidence may be accepted, such as a record of baptism, or a bona fide, contemporary record, provided it has been in existence at least one year prior to the time it is offered. In certain cases a school record showing the age of the minor will be recognized, provided it is accompanied by the sworn state-

[6] U. S. Children's Bureau, Children's Bureau program in administration of child-labor provisions of the Fair Labor Standards Act (Typewritten memorandum), March 15, 1939.

[7] *Ibid.*

ment of parent or guardian, and also a certificate from a physician testifying that he believes the physical age of the minor is as alleged.[8]

However good the standards for age certification, they cannot accomplish their purpose unless the certificating agents themselves are competent officials. Some state services are still weak in this regard.[9] However, if we may judge by the brief period of federal regulation under the 1916 law, the influence of federal standards of administration will tend rather quickly to bring improvement in such states.[10]

In the case of those states whose standards substantially conform to a federal level, the Bureau's procedure has been to designate appropriate agencies within the state to issue state certificates of age; these thereupon have the validity of federal certificates. In certain states where certificating systems do not quite come up to a federal level the Bureau has designated state agencies temporarily to issue certificates valid under the federal law, pending improvement in their state systems.[11] When state laws do not provide for employment certificates, then arrangements must be made for issuing federal certificates either directly by a federal agent or through some existing state agency.

The procedure now being followed closely parallels that used by the Bureau in the administration of the Child Labor Law of 1916. Today, however, the task is much easier due to improvement in state standards during the intervening twenty years. When the 1916 law became operative, while 39 states and the District of Columbia were designated to issue age certificates for the first six-months period, at the end of six months, only 13 states were redesignated for a 12-months period, while 22 were continued for only six months and two were approved for but three months. The Bureau itself issued federal certificates in North Carolina, South Carolina, Georgia and Mississippi, and later in Virginia, because in these states certificating systems were nonexistent or else too far below federal standards to accept.[12]

Within a month after the Fair Labor Standards Act of 1938 became operative, appropriate agencies in 41 states and the District of Columbia had been designated to issue certificates of age according to their usual procedures, these to be given the validity of federal certificates.[13] By April, 1939, one more state had been added, making 42. The first order was for a period of six months; by a regulation issued April 24, 1939, it was extended to November 1, 1939.[14]

In the six states without appropriate certificating systems, the situation is being handled as follows: In Idaho the state law does not provide for employment certificates to minors, but the Bureau has arranged for the State Department of Public

[8] U. S. Children's Bureau, Child Labor Regulations, Regulation No. 1, Certificates of Age, October 14, 1938; also Regulation No. 1-A, Temporary Certificates of Age, and Regulation No. 1-B, extending the date of temporary certificates of age regulation.

[9] WHITE HOUSE CONFERENCE OF CHILD HEALTH AND PROTECTION, III D, CHILD LABOR, *Report of Subcommittee on Child Labor* (1932) 419 ff.

[10] ABBOTT, *op. cit. supra* note 2, at 486-495.

[11] U. S. Children's Bureau, Child Labor Regulations, Regulation No. 1.

[12] ABBOTT, *op. cit. supra* note 2, at 489-490.

[13] McConnell, *Child Labor and the Fair Labor Standards Act* (1939) 6 LAB. INF. BULL. No. 2, p. 10.

[14] U. S. Children's Bureau, Child Labor Regulations, Regulation No. 10, Acceptance of State Certificates.

Instruction to issue federal certificates.[15] In Mississippi federal certificates of age are issued through an office set up in Jackson.[16] For the four remaining states, Iowa, Louisiana, North Dakota and Texas, the Bureau is in process of making arrangements.[17]

Employers are advised to obtain certificates of age for each minor 16 or 17 years old. In the case of occupations declared hazardous for minors between 16 and 18, the employer is to have certificates for each employee 18 or 19 years old. He may ask for certificates of age for any other young people in his employ if he has any doubt about their ages. It is thus he protects himself from involuntary violation of the Act.

For its work of inspection the Children's Bureau is able to call upon the aid of the Wage and Hour Division, which makes routine inspections of establishments producing for interstate commerce in connection with enforcement of wage and hour regulations. The Bureau has arranged with the Division to check for child labor wherever the latter's inspectors go. If apparent violations are found, then the Bureau will have its own staff take up the matter, investigate for proof of age, and do anything further that the case may require. For certain industries that do not come under the Wage and Hour Division but are covered by the child labor provisions of the Act, the Children's Bureau has to make the initial investigations.[18]

Officials responsible for enforcing state child labor laws can also aid in the detection of violations. So can trade unions. As an official of the Bureau has pointed out, workers are in a strategic position to know when employers are not living up to the provisions of the Act.[19] If trade unions are alert to the problem, they can be of indispensible aid in bringing about strict observance.

In the determination of hazardous occupations for minors 16 and 17 years of age, the Bureau proposes to move with deliberation and caution. Its procedure envisages special studies and investigations to build up a body of accident and occupational-disease statistics touching young workers. In doing this it expects to work in close collaboration with experts, also with state accident commissions, and with employers and representatives of labor.[20] It has in view the appointment of an advisory committee on occupations hazardous to minors to aid it in establishing general policies and procedures.[21]

Up to mid-May, 1939, only one hearing had been held to determine hazardous employments, that for the explosives industry.[22] The proposed finding and order

[15] McConnell, *supra* note 13, at 11.

[16] Letter from Nicholas E. Allen, Attorney, Children's Bureau, U. S. Department of Labor, April 28, 1939.

[17] McConnell, *supra* note 13, at 11.

[18] U. S. Children's Bureau, Memorandum, *supra* note 6.

[19] McConnell, *supra* note 13, at 11.

[20] U. S. Children's Bureau, Memorandum, *supra* note 6; also Child Labor Regulations, Regulation No. 5, Procedure Governing Determination of Hazardous Occupations, November 4, 1938.

[21] McConnell, *Oppressive Child Labor Is On the Way Out*, January, 1938. (Mimeographed).

[22] U. S. Children's Bureau, Notice of Hearing on Proposed Finding and Order Relating to the Employment of Minors Between 16 and 18 Years of Age in the Manufacture of Explosives Including Goods Containing Explosive Components Under the Fair Labor Standards Act of 1938, March 15, 1939.

to ban the employment of minors of 16 and 17 "from all occupations in or about any plant manufacturing explosives," defines plants to mean the land and buildings and other structures used for manufacture or processing of explosives. Explosives include ammunition, smokeless powder and all goods classified by the Interstate Commerce Commission as falling in that category.

Of especial interest in this first proposed order in the field of hazardous occupations is the type of evidence on which the finding is based. The Children's Bureau made its own investigation, from which it concluded that "despite progress in the promotion of safe working conditions," the manufacture of explosives is still hazardous in nature. Data for 1936 show the accident severity rate for explosives to be approximately twice that of the average for all manufacturing industries. Because young workers are "characteristically lacking in the exercise of caution," to work in explosives plants is peculiarly hazardous for them. Twenty-two states have recognized this fact by setting a minimum age for work in such plants higher than the general minimum. Moreover, it has been the policy of some manufacturers of explosives to refuse to hire any young workers under 18 years of age.[23] The hearing was held on March 28, 1939, and it is expected that a permanent order will be forthcoming.

Concerning child laborers between 14 and 16 years of age in non-mining and non-manufacturing industries for whom the Bureau must determine the work conditions that do not interfere with their schooling or well-being, it is perhaps correct to say that two different administrative problems present themselves. One has to do with the work of children in agriculture. The Act exempts such children if they do not go to the fields "while legally required to attend school." Because of this exemption we do not really know to what extent the Act actually affects agricultural child labor. Nor has the Bureau indicated yet what may be its procedure in dealing with this field.

The problem of young children in urban occupations is less complicated. School terms are fairly uniform in cities and towns, urban school authorities in most states are apt to be familiar with child labor laws and procedures, industrial establishments producing for interstate commerce are reasonably easy to get at for purposes of inspection. Altogether, enforcement can proceed along established lines.

The Bureau has issued a series of temporary regulations touching the employment of children 14 and 15 years old,[24] the first on October 21, 1938. On February

[23] *Ibid.*

[24] U. S. Children's Bureau, Child Labor Regulations, Regulation No. 3, Temporary Regulation for Employment of Minors Between 14 and 16 Years of Age, October 21, 1938; Regulation No. 3-A, Amendment to Temporary Regulation . . ., November 3, 1938, (making a certain clause in previous regulation of no force and effect until a public hearing had been held); Regulation No. 3-B, Extension of Temporary Regulation . . ., January 10, 1939 (the original regulation as amended being extended until April 24, 1939); Notice of Hearing on Proposed Regulation Relating to the Employment of Minors Between 14 and 16 Years of Age . . ., January 31, 1939 (the hearing being set for February 15, 1939); Proposed Regulation as Revised, April 20, 1939 (with notice that the hearing having been held, the regulation would be published in the *Federal Register*, with a period of ten days allowed in which objections might be received, after which the regulation would become permanent).

15, 1939, a hearing was held, followed by a proposed permanent regulation. According to the regulation, such child laborers are not permitted to work at "manufacturing, mining, or processing occupations, including occupations requiring the performance of any duties in work rooms or work places where goods are manufactured, mined, or otherwise processed." Nor are they permitted to work at occupations involving the "operation or tending of hoisting apparatus or of any power-driven machinery other than office machines"; nor may they operate motor vehicles or serve as helpers on motor vehicles; nor may they enter public messenger service; nor may they work at occupations that the Children's Bureau finds to be hazardous for minors of 16 and 17.

But children of 14 and 15 may work at all other occupations in interstate industries (not counting, of course, the exempt occupations, including agriculture), within the following prescribed periods: (a) outside school hours; (b) not more than 40 hours in any one week when school is not in session; (c) not more than 18 hours in any one week when school is in session; (d) not more than 8 hours in any one day when school is not in session; (e) not more than 3 hours in any one day when school is in session; (f) between 7 a.m. and 7 p.m. in any one day, except in the distribution of newspapers; between 6 a.m. and 7 p.m. in any one day, in the distribution of newspapers, except that from April 1 to September 30 they may work until 8 p.m.; they may not, however, distribute newspapers "both before and after noon of any day when school is in session except between 7 a.m. and 7 p.m."

Within the terms of the Act the Bureau could ban children of 14 and 15 from occupations in other interstate industries than those now prohibited if it found such occupations to be injurious to these children. Here, as in the question of hazardous occupations, painstaking investigation must precede regulation, and the Bureau has as yet been unable to undertake inquiries in this field.[25]

Indeed, insofar as the Bureau is seriously handicapped on the administrative side, it would seem to be because it has insufficient facilities to carry on investigations to determine unwholesome and hazardous occupations. So the matter appears judged from the outside. Limitations of staff, we are told, make it impossible for the Bureau to study more than one industry at a time for its hazards to young workers.[26] Given the long-drawn-out process that investigation and hearings entail, the prospect for early determination of hazardous employments is discouraging. What a pity that years ago the Bureau was not provided with the facilities for large-scale research in this field! Not only would it then have been ready when federal legislation came: it could have rendered a service to state child welfare agencies in their attempts to prevent serious injury to the health and safety of young workers. Merely to have been able to inform the public of the facts on hazardous occupations would have been a factor in eliminating some of the abuses.

In other respects than the foregoing the Bureau has the means of enforcing the child labor provisions of the Act with a fair degree of success. It can do so because

[25] Letter from Nicholas E. Allen, *supra* note 16. [26] *Ibid.*

it is permitted to call upon the facilities of state agencies and upon those of the Wage and Hour Division.

COVERAGE AND EXEMPTIONS

If the Act's coverage were commensurate with its administrative provisions we should feel that great progress had been made. Not that in it child labor regulation has stood still. Age stipulations in the Act, given the occupations to which they apply, have advanced us considerably beyond the standards at present prevailing in a number of states. At the time the Act was passed only sixteen states had 16 years as the minimum age for factory employment. In three the minimum was 15, in twenty-four it was 14, while eight states still permitted exceptions to be made in the case of children under 14. In the matter of hazardous employment, 31 states offered practically no protection to young people of 16 and 17, and nine provided next to none for those of 15 and less.[27] By prohibiting the employment of children of 16 and under in manufacturing and mining, and by permitting their employment in other occupations only under conditions that do not interfere with their schooling or their general welfare, also by making possible the eventual exclusion of minors of 16 and 17 from hazardous occupations, the Act brings under a system of uniform federal regulation many children who formerly went unprotected.

Yet certain of the fields of employment that presumably come under the Act deserve careful watching. For one, there is canning. Shrimp, vegetable and fruit canneries, located in remote districts near the source of the product, carry on operations seasonally, often under haphazard conditions of production, sometimes with migratory family labor. In the past such canneries have been among the worst offenders in the employment of young child workers, those of 14 and 15 and even younger.[28] In many states canneries have been exempt from the age and hour provisions of child labor laws, especially in the states where the canning industry is important.[29] Patently, the products of canneries would enter interstate commerce; hence, under the terms of the Fair Labor Standards Act, child labor under 16 therein should be barred. Yet we shall have to wait to see how successfully young workers are eliminated from the canning industry. For it would appear that the question of their employment is not in the view of the industry entirely closed. So recently as May 16, 1939, a very disturbing dispatch appeared in the *New York Times*,[30] reporting attempts on the part of some Congressmen to make radical changes in the Wages and Hours Law. Representative Mary T. Norton, chairman of the House Labor Committee, is quoted as having declared that those attempting to throw the measure on the floor for far-reaching amendment represent canners and similar groups of interests.

[27] Binder, *New Protection for the Child Laborer* (1938) 23 AM. TEACHER 15.

[28] Pennsylvania Department of Labor and Industry, *What of Pennsylvania Canneries?* (1925) 12 LABOR AND INDUSTRY; U. S. Children's Bureau, Pub. No. 198, Mathews, *Children in Fruit and Vegetable Canneries* (1930).

[29] U. S. Children's Bureau, Pub. No. 197, *Child Labor—Facts and Figures* (1933) Chart I, pp. 56-57.

[30] P. 17, col. 5.

Again, young workers are employed at industrial homework.[31] For this group also it is too early to tell how much protection the Act may afford, although clearly most goods produced under homework conditions would be of a kind that moves across state lines. No regulations have so far been issued by the Children's Bureau specifically dealing with the field.[32] However, orders issued by the Wage and Hour Division should be of some help. Under these regulations employers engaging homeworkers are instructed to keep records showing the name and address of each homeworker, date of birth if under 19 years old, name and address of the agent through whom the work is distributed, and detailed records for each lot of work issued each week. On the homeworker's part a record book must be kept showing the work received and returned.[33] However, at best, regulation of industrial homework is still in an experimental stage; the rules thus far promulgated no doubt are largely tentative. Were it found possible to enforce nothing more than the minimum wage provisions of the Act, it would not only tend to eliminate child labor, but homework itself very probably would soon disappear. Most employers would find it more profitable to carry on their manufacturing operations inside factory walls if instead of the few cents an hour they have been accustomed to pay homeworkers they had to pay a minimum wage of 25 cents.

The legislators who framed the child labor provisions of the Act apparently intended to bring children who sell and deliver newspapers under its protection. Section 13(a) (7) exempts only those newspapers "with a circulation of less than three thousand the major part of which circulation is within the county where printed and published." Certainly it would have been a severe blow to child welfare if children employed in this industry had not been protected. Newspapers are one of the largest child-employing fields. The newspaper industry's own figures in 1934 reported more than a quarter million children under 16 at work as sellers and carriers.[34]. Yet apparently the extent to which these child laborers are protected by the Act is still an unsettled question. Under the conditions laid down in proposed Child Labor Regulation No. 3 (as revised, April 20, 1939), children employed in newspaper occupations must conform to certain specified hours of work. But now an interpretation of the Act has been issued which apparently seriously curtails the scope of protection afforded these child workers. In a special order of April 12, 1939, the Chief of the Children's Bureau announces that with the approval of the Solicitor of the Department of Labor, newspapers which ship or deliver for shipment in interstate commerce "are subject to the child-labor provisions of the Act if the work of minors under the age of 16 years engaged in the distribution of such newspapers *requires them to come in or about the establishment* in which newspapers are produced."[35] The order thus

[31] LUMPKIN AND DOUGLAS, CHILD WORKERS IN AMERICA (1937) 50-52.

[32] Letter from Nicholas E. Allen, *supra* note 16.

[33] *Homework Under the Wages and Hours Act* (1939) 21 AM. CHILD, No. 4, p. 3.

[34] Folks, *Changes and Trends in Child Labor and Its Control,* National Child Labor Committee, Publication No. 375, June, 1938.

[35] U. S. Children's Bureau, Application of the Child Labor Provisions of the Fair Labor Standards Act to Children Engaged in the Distribution and Delivery of Newspapers, April 12, 1939. (Italics mine).

goes back to the phrase in Section 12(a) prohibiting the shipment or delivery for shipment in interstate commerce of goods produced in an establishment "in or about which" any oppressive child labor has been employed.

Only one case has so far arisen touching newspaper work and that was heard in a Michigan circuit court.[36] A newsboy 13 years of age brought suit against the publishing company for which he delivered newspapers to enjoin it from terminating its contract with him. The boy, it seems, delivered papers in his own village which lay some miles distant from Lansing where the paper was published, his papers being delivered to him by truck. The Children's Bureau did not intervene in the case because the Solicitor of the Department of Labor declared that the boy's employment could not be considered to have been "in or about" the newspaper company's establishment. Similarly the court ruled that the newsboy was not an employee of the newspaper company within the meaning of the Act, because he was not employed "in or about" the publishing company's plant. Hence his case did not come under the Act, and hence the publishing company had no grounds for terminating the contract.[37] This 13-year-old boy was free to go on delivering newspapers.

Inevitably there comes to mind in this whole situation the long-familiar argument of newspaper publishers that child distributors of newspapers are not their employees but "little merchants" who hold independent contracts with them; and that hence the publishing corporations are not responsible for the conditions under which the children work. While some of the worst conditions characterizing newsboy work in the past have been associated with the establishments where children have had to wait for their papers, studies have long ago shown that street work of all kinds for young children in itself tends to be unwholesome and hazardous.[38] Whatever was intended in the Act, newsboys who get their papers from trucks need its protection just as much as do those who receive them at the door of the publishing establishment. If the interpretation made in the *Myers* case means what it seems to mean, we have reason to fear that many children of 15, 14, and even younger, may be left outside the protection of the Act.

How limited in general is the Act's coverage is seen in the number of child workers affected by its provisions. It is estimated that some 30,000 to 50,000 minors under 16 will be withdrawn from industry as a result of the Act.[39] Yet at the time the Fair Labor Standards Act was passed a total of some 850,000 children 15 years and under were gainfully employed.[40] Thus the Act does not begin to deal with child labor as a mass problem. It touches at best less than 6 per cent of these younger employed children.

[36] Myers v. State Journal Co., C. C. H. Lab. Law Serv. ¶18,290 (Mich. Cir. Ct., 1938).

[37] Letter from Nicholas E. Allen, *supra* note 16.

[38] U. S. Children's Bureau, Pub. No. 227, *Children Engaged in Newspaper and Magazine Selling and Delivering* (1935); Pub. No. 183, McGill, *Children in Street Work* (1928); see also LUMPKIN AND DOUGLAS, *op. cit. supra* note 31, at 9-10, 45-49.

[39] No estimates have yet been attempted of the number of minors 16 and 17 years of age who may in time be banned from hazardous occupations.

[40] Binder, *supra* note 27, at 14; Folks, *supra* note 34, at 24.

The seat of the trouble is obvious. The largest single child-employing field is agriculture, and agriculture has virtually been exempted in the Act. Some 70 per cent of all child laborers under 16 are employed in agriculture. At best, it is agreed, only a fraction of these can be protected under the Act as it now reads. In the areas where the worst abuses exist, especially in cotton and tobacco culture, and in areas where migratory family labor is largely employed, we can expect little effect.[41]

Many agricultural child laborers working as members of a family group are not paid a wage directly: the pay goes to the head of the family. If they are considered to be employed by their parents, then they would not come under the Act. Moreover, whatever protection is given agricultural child labor under the Act must depend, the Bureau points out, upon the scope and enforcement of compulsory school laws in the various states,[42] since children are permitted to work in agriculture "while not legally required to attend school." But it is a notorious fact that school attendance regulations in agricultural states are often extremely lax, if not waived altogether when the crops demand it. In southern rural regions, moreover, the school terms themselves are in many localities so short as to offer no real obstacle to agricultural work. And in the case of states in which migratory family labor in large numbers is employed not only is there commonly failure to enforce compulsory school laws for migratory workers' children, but some states even exclude such children legally from their schools.[43]

Under the broad definition given agriculture under the Act children who work in turpentine camps are exempt from its protection. The Act defines agriculture as does Section 15(g) of the Agricultural Marketing Act, which in turn refers to the Naval Stores Act of March 3, 1923, to include persons employed on the production, cultivation, growing or harvesting of crude gum from a living tree or in processing gum spirits of turpentine and gum rosin from crude gum.[44] This industry, located chiefly in the States of the lower South, when investigated by the National Child Labor Committee in 1937, was found to employ many children under 16 at low wages and very long hours.[45] The conditions of work were patently unwholesome for young children. No regulation of their labor is possible as the Act reads now, except insofar as it might be found that they were employed "while legally required to attend school."

Entirely excluded from regulation by the Act are all children employed in industries and trades that are intrastate in character. Large numbers of girls under 16 years are in domestic service. Many boys and girls are in personal service trades, at work in laundries, hotels, restaurants, beauty parlors, filling stations. Many serve as clerks in stores, or are employed at messenger and clerical work of a routine kind.

[41] LUMPKIN AND DOUGLAS, *op. cit. supra* note 31, cc. V and VI (for a discussion of agricultural child labor).

[42] Letter from Beatrice McConnell, Director, Industrial Division, Children's Bureau, U. S. Department of Labor, March 16, 1939.

[43] WHITE HOUSE CONFERENCE, *op. cit. supra* note 9, at 291 ff; Folks, *supra* note 34, at 24.

[44] Letter from Nicholas E. Allen, *supra* note 16.

[45] Sidel, *Dipping Gum for "Babbitt"* (1938) 20 AM. CHILD No. 2, p. 1.

Their hours of labor are usually long, their wages very low. Together these constitute a large body of child labor in the non-agricultural field. In fact it has been estimated that hardly more than 25 per cent even of non-agricultural child workers come under the protection of the Act.[46]

Since agricultural child workers under 16 years, constituting almost three-fourths of all gainfully employed children, are virtually exempt from the Act's provisions; and since 75 per cent of the non-agricultural group are also excluded from its terms, most of the child labor problem remains to be dealt with.

This fact is even more serious than at first appears, since the fields wherein children are today in greatest demand are those in which child labor has been increasing. In manufacturing and mining there has been a decrease in child employment during recent decades, not alone because these occupations have been the subject of regulation, but because technological changes, the introduction of new, more complex machinery, has made the employment of very young operators less advantageous. To be sure, until the passage of the Fair Labor Standards Act, children were still employed in textile mills in considerable numbers, and at miscellaneous mechanical operations. The provision of the Act banning children under 16 years from all manufacturing and mining operations was sorely needed.[47] In recognizing that, however, we should not forget the occupations where the demand for child labor has remained unabated, namely, in agriculture and in the intrastate, non-mechanical, urban types of work. Here where the great bulk of child laborers are found, their work remains largely unregulated.

If uniform federal regulation is to be applied to this great bulk of child wage earners, a Constitutional amendment is necessary. It should be established beyond any doubt that Congress has the power to deal with all phases of the problem. Hence, the importance of the Child Labor Amendment, pending since 1924. Now that the Supreme Court has rendered its favorable decision on the Kansas and Kentucky cases (June 5, 1939), the organizations and individuals interested in eliminating harmful child labor can be free to concentrate their efforts upon obtaining the eight additional ratifications needed to complete adoption of the Amendment. Congress can then proceed to make up the deficiencies in the Fair Labor Standards Act, deficiencies that are inevitable so long as it has power to legislate on this problem only for interstate industries.

What will be done in the matter of agricultural child labor is another question. Congress could deal with this field more adequately now if it saw fit, since the major crops on which children work enter interstate commerce. The writer has treated the

[46] Folks, *supra* note 34, at 24.

[47] Up to mid-May, 1939, the Children's Bureau had taken legal action in one instance to enforce the 16-year-age minimum in manufacturing. Lenroot v. Duplan Silk Corporation, (W. D. Va., March 29, 1939). Suit was brought by the Chief of the Children's Bureau under Section 17 of the Act and in accordance with section 12(b). The Duplan Silk Corporation, manufacturers of rayon fabric at Grottoes, Virginia, consented to the entry of a decree against it perpetually enjoining it from future violation of Section 15 (a) (4) of the Act which prohibits violations of the child labor provisions. Letter from Nicholas E. Allen, *supra* note 16.

necessity for this at length elsewhere.[48] Suffice it to say here that the reason agricultural occupations are exempt under state child labor laws and now under the federal law is not because the conditions under which children work in agriculture are harmless. On the contrary, special investigations have demonstrated repeatedly that it cannot be good for the health and well-being of young children ranging in age from six years up to labor extremely long hours in the fields. Sooner or later the nation will have to come to grips with this problem.

Meantime it is gratifying to note that state child welfare agencies are themselves seeking to take advantage of the more effective child labor regulation possible under the Fair Labor Standards Act. Even more significant, they see the necessity for broadening the scope of federal regulation. The Fifth National Conference on Labor Legislation held in Washington, D. C. in November, 1938, attended by labor and welfare officials of the various states, recommended supplemental state legislation to facilitate cooperation of state agencies in the administration of the child labor provisions of the Act. It urged that all state child labor standards should be raised to those of the Act. Furthermore the resolution significantly took the position that "Every effort be made to complete ratification of the pending Federal Child Labor Amendment."[49]

ECONOMIC ADJUSTMENTS

With so small a number of child laborers displaced as a result of the Act, it is difficult to see wherein any general economic problems could attend application of its provisions. But taken in its local ramifications, the Act is likely to give rise to many problems. Not the least of these is the economic hardship suffered by those families who for one reason or another are dependent upon a young child's earnings for their principal means of livelihood. By and large, the reason children go to work is family poverty.[50] Child workers contribute their wages to the home to buy necessities. During periods of widespread unemployment such as we have had in America for the past ten years, instances exist of families whose younger members can find work, at positions that pay a mere pittance, to be sure, while the adult members can find nothing. The solution to the problem of family poverty is certainly not the one advanced for so many years by opponents of regulation at hearings on child labor bills and in the press, that because families needed the children's earnings, children should therefore be allowed to work. Some states went so far as to incorporate this line of reasoning in their laws, by permitting exemptions even for children under 14 years to work in factories. The only defensible procedure is to ban child labor, and then to deal with the cases of economic hardship that arise.

Fortunately today many federal social services exist through which adjustments may be affected for those families or communities which suffer by the displacement of child workers. If a mother with dependent children is involved, mothers' assistance laws furnish relief. State laws are now more adequate due to the aid provided under

[48] LUMPKIN AND DOUGLAS, *op. cit. supra* note 31, cc. V and VI.
[49] (1939) 38 MO. LAB. REV. 130.
[50] LUMPKIN AND DOUGLAS, *op. cit. supra* note 31, at 162 ff.

the Social Security Act. When adult members are thrown out of work, the pressure upon younger family members to look for positions is likely to become very great. Some of these cases will be relieved by the existence of new unemployment insurance laws. The most important role will be played by the works program of the Federal Government. When local child welfare agencies come upon families whose children of 14 or 15 are displaced by reason of the prohibitions in the Fair Labor Standards Act, if the parent can find no employment in private industry, then he can be aided in finding work through local WPA authorities. The task of enforcing the child labor provisions of the Act would be very much harder if we did not have a federal works program.

When more headway has been made in the determination of occupations hazardous to minors of 16 and 17, some difficult local situations may well arise as a result. If in a town of few industries, for example, one of ranking importance were found to be hazardous for young people, and consequently numbers of young workers in the locality were displaced, a major social problem could develop, requiring a first-rate community program for its solution. Apparently the Children's Bureau recognizes some responsibility in situations of this type to aid state agencies in working out programs.[51] No doubt the help of agencies such as the National Youth Administration might also be enlisted.

The minimum wage provisions of the Fair Labor Standards Act should further facilitate adjustments. Generally speaking, young workers' wages tend to be very low. Since the minimum wage provisions of the Act apply regardless of age,[52] it is reasonable to suppose that as a result of federal wage minimums, in many cases the wages of young people will be higher than hitherto. By so much would the economic situation of some families at least be improved. It is possible that young workers may suffer some discrimination under Section 14 of the Act, which provides special treatment for learners, apprentices, and handicapped workers. It permits the Wage and Hour Division to set wages lower than the minimum wage for workers in these classifications. Under NRA codes some employers were found who took advantage of apprenticeship and learner exemptions to hire experienced workers at a lower-than-minimum wage. Something like that might happen to young workers under Section 14, on the part of employers with a disposition to try to circumvent the intent of the Act. No doubt such instances will not be common, and in general the wages of young people under 18 years in interstate industries would tend to rise.

Minimum wage provisions of the Act may have a further wholesome influence. For insofar as young workers are paid the same wage as older, more experienced workers for the same operation, there is no longer a premium on the employment of inexperienced young people under 18. This should in the long run tend in the direction of decreasing the demand for young workers. Thus it would help to accomplish the purpose of the child labor provisions of the Act, so far as possible to eliminate oppressive child labor.

[51] U. S. Children's Bureau, Memorandum, *supra* note 6.

[52] U. S. Department of Labor, *A Ceiling for Hours, A Floor for Wages, and A Break for Children*, (leaflet, 1938) 10.

THE ECONOMIC COVERAGE OF THE FAIR LABOR STANDARDS ACT: A STATISTICAL STUDY

CARROLL R. DAUGHERTY*

The administrative reason for wanting to measure the coverage of the Fair Labor Standards Act and the extent of low wages and long hours in covered employment was the need for knowing in general terms how much work would have to be done in effectuating the Act, and where it would have to be done. The provisions of the Act affect employees who are engaged in (interstate) commerce or the production of goods for (interstate) commerce. Measurement of the Act's coverage is, therefore, an enumeration of employees so engaged. No systematic attempt has yet been made to provide a specific answer to this question, or to the corollary question of the number of local-selling enterprises and employees directly competing with those selling in interstate commerce. Such an enumeration, together with subsidiary information on the quantity of goods and services involved, would undoubtedly be useful. It might, for example, serve to persuade hitherto unconvinced legislators and judges of the importance of removing the economic blockages arising when an industry or an enterprise is required to operate in a legal framework that may be significantly different in each of the states in which it does business. It would be useful in an analysis of how trade practices or labor standards which have come to be regarded as undesirable can spread through the industrial system or reshape the location and conduct of industry, as may happen when a given region of the country makes a late start in industry, and tries to compensate for that handicap by paying unduly low wages.

It was impracticable to count the employees covered by the Act, not only because final decision on coverage rests with the courts under the terms of the Act, but also because of the staggering statistical difficulties to be overcome. A complete census could be taken as of a given month, but its cost would be prohibitive both in public expense and in cost to business. Furthermore, some employees may be within the definition of coverage one month and outside of it the next. Fortunately—and rather obviously—a census was not essential to the effective operation of the Division. The Administration needed answers to the questions on the number of employees covered by the Act and the number of employees immediately affected by the minimum wage and maximum hour provisions that took effect October 24, 1938. The estimates reported briefly herein are not the results of exhaustive survey; they are rough ap-

* A.B., 1921, Lebanon Valley College; M.A., 1924, Ph.D., 1927, University of Pennsylvania. Chief Economist, Wage and Hour Division, United States Department of Labor. Professor of Economics (on leave), University of Pittsburgh. Author, *Labor Problems in American Industry;* co-author, *Economics of the Iron and Steel Industry.*

proximations intended to meet an administrative need. A high degree of precision was not necessary and was not sought. They are based on readily available data for industries predominantly interstate in character.

The estimated figures for September, 1938 are:

1. The number of employees covered by the Act	11,000,000
2. The number receiving less than 25 cents per hour	300,000
3. The number receiving less than 30 cents per hour	550,000
4. The number receiving less than 40 cents per hour	1,418,000
5. The number working more than 44 hours	1,384,000
6. The number working more than 42 hours	1,751,000
7. The number working more than 40 hours per week	2,184,000

It should be noted that the figures for employees receiving less than 25 cents per hour and those working more than 44 hours per week are the results of extremely conservative estimates, although some workers may have been included who will be found on further interpretation or court review to be exempt from the Act. An example of possible overstatement is the fact that no attempt has been made to estimate the number of coal operatives who may be engaged in enterprises producing coal that is consumed within the state. Also, while a substantial deduction was made from the total of quarrying workers to allow for local sales, the deduction may prove to have been too small. Then, too, it is quite likely that many enterprises with fewer than 6 workers will be found to be engaged in the production of goods for interstate commerce; in the present estimates, 220,000 employees of small manufacturing firms were deleted to allow for the possibility that firms of this size are engaged in local business exclusively. The employment figures included for wholesaling were also very conservative; only about 300,000 out of a total of approximately 1,400,000 were included in the coverage estimate. No employees engaged in construction and maintenance of highways were included, although the opinion of counsel for the Division is that employees on interstate highway construction are covered by the Act. No estimate was made of the number of employees of mail-order companies who are engaged in interstate commerce, or of main office and warehouse employees of chain stores. All retailing employees were omitted.

It may appear to some that the resulting estimate of about 11,000,000 employees covered by the Fair Labor Standards Act is rather low, in view of the fact that the Census of Occupations of 1930 shows a total of over 48,000,000 gainful workers. It should be remembered, however, that the Act does not cover farm labor, retail trade, domestic and personal service, governmental service, or the self-employed. These exclusions from Act coverage are also responsible for the small number estimated to be receiving less than 25 cents an hour as of September, 1938, since employment in agriculture, retail trade, and domestic service includes a very large proportion of the low-paid workers in the United States.

The following table shows the distribution of 10,670,000 covered employees by major industry groups:

TABLE 1. NUMBER OF EMPLOYEES COVERED BY THE FAIR LABOR STANDARDS ACT, BY MAJOR INDUSTRY GROUPS, SEPTEMBER, 1938

Industry Group	*Employees*
Mineral industries	641,000
Manufacturing	6,793,000
Transportation	1,909,000
Communication	416,000
All Others	911,000
	10,670,000

The above figures do not include nearly 200,000 homeworkers who are covered by the Act, and also exclude about 10,000 covered employees in Alaska and Hawaii. The total coverage in September, 1938 was approximately 10,864,000, geographically distributed as follows:

TABLE 2. NUMBER OF EMPLOYEES[1] COVERED BY THE FAIR LABOR STANDARDS ACT, BY STATES, SEPTEMBER, 1938

States	*Employees*	*States*	*Employees*
Maine	89,269	South Carolina	139,625
New Hampshire	68,978	Georgia	174,379
Vermont	25,451	Florida	66,524
Massachusetts	539,688	Kentucky	138,972
Rhode Island	121,571	Tennessee	162,872
Connecticut	284,922	Alabama	135,697
New York	1,084,385	Mississippi	38,736
New Jersey	558,495	Arkansas	61,611
Pennsylvania	1,177,286	Louisiana	92,625
Ohio	792,717	Oklahoma	86,480
Indiana	390,461	Texas	231,707
Illinois	841,264	Montana	32,606
Michigan	584,183	Idaho	19,709
Wisconsin	310,418	Wyoming	14,595
Minnesota	149,886	Colorado	61,674
Iowa	123,679	New Mexico	16,454
Missouri	251,328	Arizona	29,586
North Dakota	12,233	Utah	34,856
South Dakota	12,217	Nevada	8,589
Nebraska	60,971	Washington	136,137
Kansas	110,793	Oregon	86,687
Delaware	22,778	California	482,152
Maryland	191,066	Alaska[2]	2,953
District of Columbia	26,342	Hawaii[3]	7,991
Virginia	192,582	Puerto Rico[4]	101,702
West Virginia	183,074		
North Carolina	293,258	TOTAL	10,864,214

[1] Includes about 135,000 homeworkers (exclusive of Territories).
[2] As of 1935.
[3] As of 1929-30.
[4] As of 1937-38. Includes 60,000 homeworkers.

The tentative total of nearly 11 million covered employees is roughly one-third of the total number of wage earners and salaried employees in the United States. The problem of estimating the number of covered employees affected directly by the wage and hour provisions embodied in the Act was even more difficult. The Fair Labor Standards Act established a minimum hourly wage of 25 cents and time-and-a-half pay for hours worked in excess of 44 hours per week, effective October 24, 1938. Employees working at less than the stated minimum wage or working more than 44 hours and not receiving the prescribed penalty wage for overtime were, therefore, immediately affected by the provisions of the Act. The number of employees receiving less than 25 cents per hour in September, 1938, is estimated at more than 174,000 for the 48 states, and more than 216,000 for the United States and Puerto Rico. Some obvious sources of shortage, for which no accurate correction could be made on the basis of available data, are the following:

(1) The above estimate does not include home workers. There were about 135,000 home workers in continental United States and about 60,000 in Puerto Rico in September, 1938. Although the amount of home work done in the country as a whole may be highly variable, there is no doubt that a large number of persons were actually so employed in that month. Studies by the Women's Bureau and other agencies show that wages received for such work are generally very low, and a very large proportion of those doing home work just before the effective date of the 25 cent minimum wage were unquestionably earning less than that wage. The actual number of low-wage employees probably far exceeded 25,000, even if a large deduction is made for sporadic work in order to put the estimate in terms of substantial employment during the month. (It may be noted, incidentally, that many of the additional home workers per household are children, whose employment is subject to control of the Children's Bureau under Section 12 of the Fair Labor Standards Act.)

(2) It was not possible to estimate accurately the number of low-wage employees in some industries in which the wages tend to be clustered around several concentration points instead of being grouped closely around the general average. For example, the estimate may understate by as many as 20,000 or 30,000 the number of employees receiving less than 25 cents as common laborers in one or two industries alone, and by 40,000 or more for the entire coverage of the Act. The unfavorable conditions of business for several months preceding September increase the likelihood that the understatement was substantial.

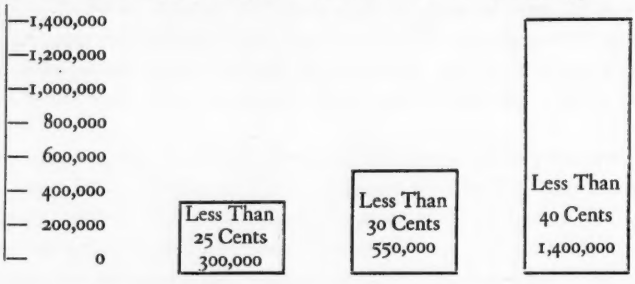
(3) The estimates were developed largely from special surveys made by the Division of Wage and Hour Statistics of the Bureau of Labor Statistics and from figures reported regularly to that Bureau. With reference to the latter, particularly, it must be noted that voluntary reporting to governmental agencies commonly introduces some bias in the data because the reporting establishments tend to be those maintaining high standards in trade practices and labor relations. Statistical analysis based on such reported figures tends to understate the proportion of employees receiving very low wages.

(4) Another statistical difficulty tending to reduce the estimate of the number of employees receiving less than 25 cents is the fact that the few low-wage employees in industries with high average wages are so small a proportion of the total in their respective industries that they may not be shown precisely in frequency distributions of wages. It was not possible with the data available to estimate accurately the number of employees receiving less than 25 cents per hour for any industry with an average wage of 65 cents or more. More than five million employees covered by the Act were attached to industries in this class. The estimate given above—216,000—does not include any employees in these industries. Nevertheless, it is quite likely that these industries employed 30,000 or more workers as general helpers, errand boys, handymen and in other low-wage occupations, since there are nearly 20,000 establishments in these industries.

(5) Accurate surveys may reveal considerable numbers of workers falling within the scope of the Act in enterprises omitted from the present estimates because the nature of the business done or the small number of wage earners per establishment introduced some uncertainty as to whether these enterprises should be included.

If a rough estimate of the number of employees coming under each of the groups mentioned in the above comments is included, the total would have to be raised by more than 100,000, making a roughly estimated total of more than 300,000 (see fig. 1) receiving less than 25 cents per hour.

FIGURE 1. NUMBER OF EMPLOYEES COVERED BY THE FAIR LABOR STANDARDS ACT, RECEIVING LESS THAN 25, 30, AND 40 CENTS PER HOUR IN SEPTEMBER, 1938



Because of the many difficulties involved in an estimate of the number of low paid workers covered by the Act, no attempt is made herein to present these figures for geographic areas or industry groups. Extensive and detailed additional study of the wage structure in individual industries and in specific areas is necessary before such estimates can be made with reasonable assurance of accuracy. The total given above must be regarded as a preliminary statement of the minimum number of employees whose wages were below 25 cents in the month preceding the effective date of the 25 cent minimum and who were, therefore, affected immediately by the wage provisions of the Act. It was not possible in the present account to extend the estimate reached for the United States as a whole—216,000—with equal soundness to the types

of enterprises referred to in the remarks listed above or to subdivide that estimate by region and by industry.

A general minimum wage of 40 cents per hour for employees covered becomes effective after seven years of operation of the Fair Labor Standards Act. A number of persons now receiving less than 40 cents may be affected in the near future by wage orders gradually increasing the minimum wage in the industries to which they are attached. The following table (see also Fig. 2) shows the estimated number of employees receiving less than 40 cents in September, 1938, by industry groups.

TABLE 3. NUMBER OF EMPLOYEES COVERED BY THE FAIR LABOR STANDARDS ACT,[5] AVERAGE HOURLY EARNINGS, AND NUMBER RECEIVING LESS THAN 40 CENTS PER HOUR, BY INDUSTRY GROUP, SEPTEMBER, 1938[5]

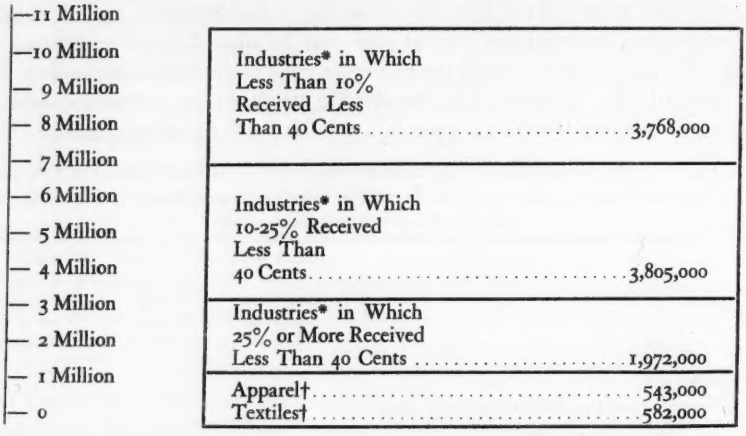
Industry Group	*Total Number of Employees covered (thousands)*	*Average Hourly Earnings (cents)*[6]	*Number of Employees Receiving Less Than 40 Cents (thousands)*
Manufacturing			
Iron and Steel and their Products, not including machinery	652	75.3	29
Machinery	657	72.1	28
Transportation Equipment	351	89.7	1
Nonferrous Metal Products	169	68.1	15
Lumber and Allied Products	440	52.6	111
Stone, Clay and Glass	150	63.2	16
Textiles and their Products:			
Fabrics	901	46.2	373
Wearing Apparel	551	53.9	146
Leather	242	52.4	64
Food and Kindred Products	678	57.6	163
Tobacco	91	45.8	36
Paper and Printing	406	76.5	31
Chemicals and Allied Products	280	74.4	28
Rubber	102	75.8	8
Not Otherwise Classified:			
Durable	595	70.8	27
Nondurable	478	57.7	84
Non-Manufacturing	3,886	68.1[5]	216
Total, Excluding Puerto Rico	10,629		1,376
Total, Including Puerto Rico	10,670		1,418

These estimates are on somewhat firmer ground than the corresponding figures for employees receiving less than 25 cents. Understatements or errors characterizing the latter are, of course, involved in the attempt to count the number getting less than 40 cents, but their proportionate influence is greatly reduced in the larger totals.

[5] Estimates by Economic Section, Wage and Hour Division.

[6] Data from *Employment and Payrolls, September, 1938*, Bureau of Labor Statistics, pp. 10-13.

FIGURE 2. EMPLOYEES COVERED BY INDUSTRY COMMITTEES AND DISTRIBUTION OF ALL OTHER EMPLOYEES COVERED BY THE FAIR LABOR STANDARDS ACT BY INDUSTRY PERCENTAGE RECEIVING LESS THAN 40 CENTS PER HOUR IN SEPTEMBER, 1938



* Excluding Employees Covered by the Textile and Apparel Industry Committees.

† Under Apparel Committee, as of November 1938, 512,000; under Textile Committee, as of November, 1938, 600,000. The figures for these two Industries differ from those shown in the Tables in this Section; the figures in this chart are based on definitions of Industry Committee coverage.

In March, 1939, the total of covered employees stood at about eleven and one-quarter million. By May, 1939, nearly one and three-quarters million employees were included in industries for which committees had already been appointed—textiles, wool, apparel, hosiery, hats, millinery and shoes.

In September, 1938, there were 1,380,000 employees working more than 44 hours per week. A still larger number of employees—1,750,000—worked more than 42 hours during the month of September. The difference between the two estimates—those working over 44 hours and those working over 42 hours—suggests the additional number that are likely to be affected by the basic maximum for the second year of operation of the Act. Similarly, a substantially larger number of employees appear to be subject to a change in working conditions resulting from the Act at the end of two years, when the 40-hour maximum takes effect. The possibility of gradual adjustment of working shift during the two years before the effective date of the 40-hour maximum is likely to result in reducing the number of overtime hours worked when the overtime rate becomes effective. However, there will undoubtedly be situations in which an adjustment of shift will be impractical and in those instances the men already on the job may benefit accordingly. The following table shows the number of employees who worked more than 44, 42, and 40 hours per week in September, 1938, by major industry groups.

TABLE 4. AVERAGE NUMBER OF HOURS WORKED PER WEEK, AND NUMBER WORKING MORE THAN 40, 42 AND 44 HOURS BY INDUSTRY GROUP, FOR EMPLOYEES COVERED BY THE FAIR LABOR STANDARDS ACT, SEPTEMBER, 1938[7]

Industry Group	*Average Number of Hours Worked*[8] *Per Week*	*Number of Employees Working More Than*		
		40 hours	*42 hours*	*44 hours*
			(thousand)	
Manufacturing:				
Iron and Steel and their Products, not including machinery	33.0	86	64	50
Machinery	35.4	80	69	48
Transportation Equipment	36.4	55	92	32
Nonferrous Metal Products	37.8	41	29	23
Lumber and Allied Products	40.3	188	135	114
Stone, Clay and Glass	36.2	21	19	13
Textiles and their Products:				
Fabrics	36.3	135	107	80
Wearing Apparel	33.9	66	54	39
Leather	36.8	39	31	23
Food and Kindred Products	41.3	340	276	241
Tobacco	37.1	15	12	9
Paper and Printing	38.0	99	75	59
Chemicals and Allied Products	38.3	67	51	40
Rubber	35.9	17	13	10
Not Otherwise Classified:				
Durable	36.0	78	65	46
Nondurable	37.5	87	66	53
Non-Manufacturing	37.2[7]	753	579	492
Total, Excluding Puerto Rico		2,167	1,737	1,372
Total, Including Puerto Rico		2,184	1,751	1,384

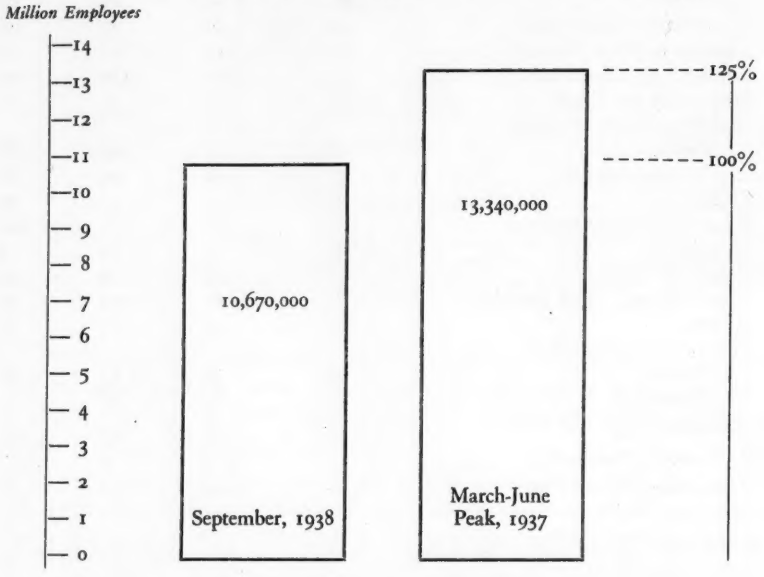
It is to be expected that, as knowledge concerning the Fair Labor Standards Act is disseminated among employers and employees throughout the country, there will be many requests for clarification of questions of jurisdiction. The estimates presented in the foregoing paragraphs will, of course, be affected by changes in the coverage resulting from the consideration of individual problems so arising. Substantial changes in coverage would also result from the enactment of amendments now being considered in Congress, affecting agricultural processing industries and salaried employees. Even more important perhaps is the fact that September, 1938 represented a substantial drop from the level of industrial activity one year earlier, so that the number of employees falling within each of the categories estimated, particularly with respect to overtime worked, was smaller than would have been the case if the rate of industrial operation had not declined.

[7] Estimates by Economic Section, Wage and Hour Division.

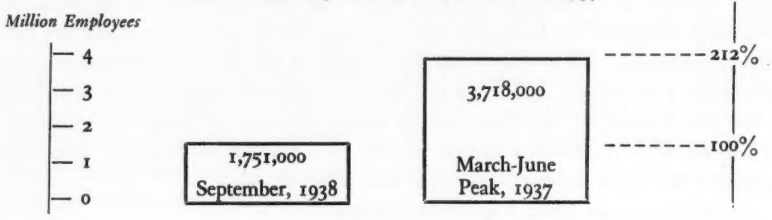
[8] Data from *Employment and Payrolls, September, 1938,* Bureau of Labor Statistics.

Estimated total employment of employees covered by the Act showed a substantial increase from September 1938 to March 1939, rising from 10,864,000 to about 11,285,000. It is important to note that a recovery in the level of business activity and employment would ordinarily be accompanied by a much more pronounced increase in the number of employees working overtime. This may be illustrated by the comparison of employment and overtime for September, 1938, and for the March-June, 1937 period of relatively high employment. In March-June, 1937, the total employ-

FIGURE 3. EMPLOYMENT OF EMPLOYEES INCLUDED IN THE COVERAGE OF THE FAIR LABOR STANDARDS ACT, IN SEPTEMBER, 1938 AND THE MARCH-JUNE PEAK, 1937



NUMBER OF EMPLOYEES INCLUDED IN THE COVERAGE OF THE FAIR LABOR STANDARDS ACT, WORKING MORE THAN 42 HOURS PER WEEK IN SEPTEMBER, 1938 AND MARCH-JUNE PEAK, 1937



ment of employees subsequently covered by the Fair Labor Standards Act was 25 per cent more than the corresponding figure for September, 1938; however, the number of employees working more than 42 hours per week in March-June, 1937 was 112 per cent above the number in September, 1938. (See Fig. 3.) With a comparable future recovery in business activity, the sharply increased overtime hours worked become potential jobs under the Act, unless the overtime work is due to a seasonal peak that can not be smoothed.

In a number of instances there have been reports that workers who had been receiving less than 25 cents had been laid off and replaced by more efficient workers. There is no evidence to show that such replacements have resulted in a marked reduction of the number of wage earners covered by the Act. To the extent that the new workers are actually much more efficient than those laid off, some curtailment of the total number of man-hours worked might occur. It is also possible that in some instances the difference in labor costs involved in raising the pre-Act wage rate to the 25-cent minimum may be sufficient to stimulate mechanization of tasks suitable for machine operation but hitherto done by hand because of low wage rates. Such technological displacement of labor is less likely if there is an actual difference in the efficiency of workers procurable at 25 cents as compared with workers hitherto employed at less than 25 cents per hour. The long-time technological effects of the minimum wage may be expected to include some shifts from hand-labor on simple tasks to better-paid machine-tending jobs and some increased investment in machine installations.

In connection with the Act's employee coverage, it may be noted that another point which has been mentioned in public discussion is the increasing of wages of workers receiving 25 cents or above, when those receiving lower pay in the same establishments prior to the effective date of the Act are raised to the new minimum. Under highly stable industrial conditions there undoubtedly would be considerable pressure for maintenance of differentials existing prior to the establishment of the minimum. It would be difficult to say at the present time, without further study, which industries would be affected in this respect by a minimum wage as low as 25 cents. This consideration may become one of marked importance during the seven-year period within which it is expected that the minimum wage per hour will be raised toward 40 cents. However, it is still much too early to attempt a factual appraisal of the net coverage effects of the Act's minimum wage rates and overtime rates.

FAVORABLE ECONOMIC IMPLICATIONS OF THE FAIR LABOR STANDARDS ACT

OTTO NATHAN*

The most important favorable implication of the Fair Labor Standards Act is the federal statutory recognition of the fact that the living conditions of those in the lowest income group should not be determined solely by the anonymous forces of the market mechanism. The Fair Labor Standards Act is a denial of the thesis that an competitive market without any regulatory interference will result in the greatest good for the greatest number of people. It postulates the necessity of considering human labor no longer as a "commodity" which is subject only to the iron laws of the market mechanism.

The theory of the free market presupposes the existence of complete freedom of trade and of free competition. It further assumes the efficiency of the price mechanism which is supposed to be the supreme arbiter of such a system. If prices—commodity prices, wages, interest rates, and any other prices—are not interfered with, they will, it is assumed, operate as a regulator between supply and demand, production and consumption, savings and investments, etc. They will force production up if the demand for commodities is larger than the supply offered. They will lead to a curtailment of production, if consumption cannot keep pace with it. The rise and fall of prices will automatically indicate the maladjustments in the various markets and will make corrective reactions not merely possible, but actually inevitable. It has been assumed that no major "maladjustment," such as a depression, could exist for any length of time if the free market mechanism were allowed to operate fully and unrestrictedly.

In large parts of our complicated economic system this theory of the market mechanism is not applicable. Because of many monopolistic and semi-monopolistic institutions and controls, free competition has never existed in the past and does not exist at present. At no time were conditions in the market such that the mechanism was able to work efficiently and to operate as it was expected to do in pure theory. Corrective reactions and readjustments either did not develop as they were supposed to, or else occurred tardily, slowly and sporadically. Economic development, there-

* Ph.D., 1920, University of Wuerzburg, Germany. Associate Professor of Economics, New York University, since 1936. Federal Statistical Office and Federal Department of Economics, Germany, 1920-1933; Lecturer, Hochschule fuer Politik, Berlin, Germany, 1928-1933; Visiting Lecturer, Princeton University, 1933-1935. Contributor to various periodicals on economics.

fore, has been characterized by instability and insecurity, by breakdowns and depressions. But it is by no means certain whether greater stability would have prevailed, and would prevail now, if free competition had been more complete in the past and if it were more complete today. The cumulative processes[1] that are so greatly responsible for the deepening and widening of economic disturbances, might be even more powerful under complete freedom of trade than under the existing system of interferences and restraint.

Strangely enough, there has been one market in this country, ever since the dawn of capitalist development, where free competition has existed to a much greater extent than elsewhere: the labor market. Wages and the working conditions have been mainly the result of free competition among the workers and of individual competitive bargaining by the workers with the employers. But since the employers rather frequently have enjoyed monopolistic or semi-monopolistic positions and protection, unlimited competition on the supply side in the labor market has added to the disadvantages of the working class in bargaining with the entrepreneur. The worker has been forced to sell his "commodity," human labor, in the same way as many other commodities are sold. However, to allow the price of human labor to be fixed by the anonymous and impersonal forces of an invisible market mechanism, means to disregard the decisive differences between all other commodities and the "commodity," human labor. Human labor is the most perishable commodity that exists; if it cannot be sold instantly, it will be lost forever. In addition, the demand for and supply of the "commodity" do not follow the laws governing supply and demand of all other commodities. A decline in its price does not lead to a curtailment of its production and, therefore, to an automatic readjustment of market conditions. On the contrary: a decline of wages is usually accompanied by an increase in the supply of human labor, by unemployment. The more wage rates decline, the greater is the pressure on wages because of the increasing supply of, and declining demand for, labor. And, finally, the "commodity," human labor, unlike any other commodity, is embodied in human beings, whose health and very existence depend on its sale.

For all these reasons, the workers as a whole are handicapped by extremely unfavorable conditions in bargaining about the price of their "commodity" with the employers in a competitive market, as Adam Smith pointed out in *The Wealth of Nations*. To assert that their wages tend towards what neo-classical theory has called their "marginal net product" is to ignore the realities of the labor market. The "marginal net product" of labor[2] is a highly abstract and hypothetical, not to say artificial, concept of neo-classical economic theory. Its theoretical validity depends, in the opinion of its defenders, on a large number of assumptions, that do not correspond with the realities of modern economy. To mention only a few, which

[1] Concerning the nature of cumulative processes see VON HABERLER, PROSPERITY AND DEPRESSION (1937) 223 ff.

[2] Space does not permit dealing with the marginal productivity concept at greater length.

are particularly important: free competition among the employers in their demand for labor often does not exist; mobility of capital and labor has declined very considerably; and rarely is work available for everybody who wants to work for a wage equal to what economists might consider to be the "marginal net product" of labor. The "marginal net product" defies any measurement and offers no criterion which could guide the employers, and, more important, the workers, in bargaining about wages and conditions of work. The conceptual approach of the marginal productivity theorists completely ignores the significance of the different economic positions of the two partners in the labor contract. And it disregards the fact that the "marginal net product," and consequently wages, often declines only because poor management or new developments at home or abroad have reduced the gross returns of the enterprise without, however, reducing the profits of the entrepreneur.

The passage of the Fair Labor Standards Act implies the acceptance of the thesis that actual experience has proved it impossible to apply the assumptions of a free market mechanism to the labor market in a modern economy.[3] The most significant result of the Act, therefore, is the protection that it affords to the worker in bargaining with the employer. By curtailing free competition in the labor market to a small degree, the Act merely helps labor to catch up with similar developments in other markets that have occurred long before. By fixing maximum hours and minimum wages, the Act assures the worker a livelihood that, in numerous cases, he otherwise might be unable to secure, as a result of the intricacies of free competition on the supply side and because of his weak position in the labor market. The limitation of free competition on the supply side of the labor market makes it impossible for irresponsible employers, lacking in social consciousness, to take unfair advantage at the expense of the worker.[4]

While the protection of the "marginal" worker and of the worker below the "margin" is by far the most important aspect of the Act, it will also affect economic developments favorably in various other directions. Those enterprises whose productivity is low and which, therefore, can exist only under conditions of work exceedingly unfavorable to labor, will eventually be forced out. If certain enterprises in some industries are unable to make the changes prescribed by law and are unable to increase their efficiency, their production will be shifted to the more efficient enterprises. Such a development is very much to be desired from the point of view of the entire economy. In Great Britain, the Trade Boards which, for the last thirty years, have been responsible for the fixing of minimum wages, have been very successful in forcing industries to reorganize. Many businesses which could maintain themselves only by the payment of sweated wages, have been forced out of existence.

[3] The necessity for state-enforced regulation of conditions of work has been frequently stressed by many neo-classical economists. See, f. i., TAUSSIG, PRINCIPLES OF ECONOMICS (3d ed. 1921) 299 ff. and 318 ff.

[4] See FRANKFURTER, DEWSON, AND COMMONS, STATE MINIMUM WAGE LAWS IN PRACTICE (National Consumers League, 1924) 51 ff. which contains letters from employers and employers' associations, stating that minimum wage regulation "takes the question of wages very largely out of competition and saves them from the necessity of holding wages down to the level of their hardest and shrewdest competitor."

But, on the whole, they have been replaced by more efficient units which have been able to support the higher rates. Wages have risen; employment has not diminished.[5]

The process of reorientation of material and human resources towards industries with a greater comparative advantage might be long-drawn-out and painful, but in the end it will result in greater efficiency and higher productivity. It is possible that the disappearance of individual businesses may result in transitory unemployment until workers can be absorbed by more productive industries or enterprises.[6] This merely means that society, as a whole, has to assume responsibility for them through relief or unemployment insurance,[7] instead of enjoying the fruit of their work at prices which do not guarantee them a decent livelihood. Both in Great Britain and in the United States, minimum wage legislation in the past has not led to permanent unemployment. Sooner or later the displaced workers will find employment in industries where their work will be more productive and efficient—a permanent gain for the whole economy.[8]

Since employers are compelled to comply with the minimum conditions set by law, they will attempt to increase managerial efficiency and to improve the entire organization of their business; they will introduce new machinery which guarantees a more economic use of existing resources. This is especially true in all cases in which some enterprises in a particular industry are more efficient than others and in which the less efficient units were able to compete successfully only by imposing bad working conditions on their workers. The minimum wage legislation in the State of California led to standardization, to more efficient management, and to the elimination of inefficient minor workers under 16 years of age in the canning industry. Efficiency was further increased in that industry by more adequate instruction of the employees, and unnecessarily long hours were limited by requiring increased rates for overtime.[9] Similar effects have been experienced in England. According to the British Ministry of Labor, it is the general opinion that the imposition of Trade Board minimum rates encouraged employers to make various adjustments in the direction of greater efficiency within their works. In nearly all cases examined in a certain year wage increases had been accompanied by organizational economies; some employers actually praised the minimum wage legislation as an incentive to

[5] Hetherington, *The Working of the British Trade Board System* (1938) 38 INT. LAB. REV. 478, 479.

[6] Fears were originally expressed that the Fair Labor Standards Act would lead to large-scale unemployment. The information so far available shows that these fears were not justified. See Andrews, *"We Have Come a Long Way"* (1939) 6 LAB. INFORM. BULL. No. 4, pp. 1 ff.

[7] It should be pointed out that, in some cases, wages are so low, that the community has to pay relief even to the workers who are employed. See PIDGEON, WOMEN IN THE ECONOMY OF THE UNITED STATES (U. S. Dept. of Labor, 1937) 70.

[8] "Although there have been individual instances of displacement (by state minimum-wage legislation for women and minors in the U. S.) the general trend in employment has shown an increase in both the number and the proportion of women, gainfully occupied." THE MINIMUM WAGE—AN INTERNATIONAL SURVEY, I. L. O. STUDIES AND REPORTS, Series D, No. 22 (1939) 237. The experience in Great Britain, resulting from minimum wages for both men and women, has been even more conclusive. See SELLS, BRITISH WAGE BOARDS (The Brookings Institution, 1939) 294 ff., and Hetherington, *loc. cit. supra* note 5.

[9] Frankfurter and Dewson, Brief in support of the California Minimum Wage Law, in FRANKFURTER, DEWSON, AND COMMONS, *op. cit. supra* note 4, at 51.

industrial efficiency.[10] Factory methods, including the introduction of machinery, especially in the clothing and laundry trades, have been stimulated by Trade Board rates, as a means of effecting operating economies to offset the extra burden imposed by an increase in wages.[11] Similarly, a study made by the International Labor Office in 1924 showed that in Sweden, Switzerland, Netherlands, Great Britain, France, the United States, etc. a reduction of hours stimulated improvements in equipment and in general organization of production and work.[12]

Higher wages and shorter hours will tend favorably to influence the health conditions of the worker and his family. Nutrition will improve; sickness will be less frequent. Improvements in the fitness of the worker and, therefore, in the efficiency of his work will be encouraged. The experience of the past few decades proves that shorter hours have led to improvements in both the quantity and the quality of production, and that these improvements are due, at least in part, to the greater efficiency of the workers. This increase in efficiency is, in turn, attributed to improved health, greater reserves of energy, a more favorable attitude toward the job, and more intelligent activity on the part of the worker.[13] Similar favorable results have often accompanied increases in wages. Better wages have made "better fed, healthier, and better satisfied workers; and they tend to result both in a better quality of work and in greater unit output."[14] The Industrial Welfare Commission of the State of Washington found that "the whole standard of efficiency and discipline has been raised."[15]

An increase in the productivity of human labor will, therefore, result from two different directions: firstly from the improvement of management and organization and from the concentration of production in the most efficient enterprises; and, secondly, from the increase in the efficiency, fitness, and health of the worker.

Finally, the Fair Labor Standards Act will have a favorable impact on the level of wages in the country as a whole and on the redistribution of national income in favor of the worker, at the expense of the employer. Wage totals will be increased[16] in all cases in which existing low wages will be forced up by the Act and in which shorter hours will be introduced without a simultaneous decline in the weekly wages paid to individual workers. Further, the minimum established for wages and the maximum for hours cannot fail to have a permanent effect on wages and hours in

[10] I. L. O., *op. cit. supra* note 8, at 139.

[11] SELLS, *op. cit. supra* note 8, 325-326.

[12] Milhaud, *Results of the Adoption of the Eight-hour Day: The Eight-Hour Day and Technical Progress* (1925) 12 INT. LAB. REV. 820 ff.

[13] See COMMONS AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION (4th ed. 1936) 85 ff; FLORENCE, ECONOMICS OF FATIGUE AND UNREST, AND THE EFFICIENCY OF LABOR IN INDUSTRY (1924) 19; Florence, *The Forty-eight Hour Week and Industrial Efficiency* (1924) 10 INT. LAB. REV. 729 ff; Milhaud, *Results of the Adoption of the Eight-hour Day; The Eight-hour Day and the Human Factor in Production* (1926) 13 INT. LAB. REV. 175 ff.

[14] See SELLS, *op. cit. supra* note 8, at 325. The British Board of Trade declared that "there are indications that in many cases the efficiency of the worker has been increased." COMMONS AND ANDREWS, *op. cit. supra* note 13, at 74.

[15] FIRST BIENNIAL REPORT OF THE INDUSTRIAL WELFARE COMMISSION, STATE OF WASHINGTON (1915) 13.

[16] In very special cases, this might not be so for a transitory period of time.

general. As experience here and abroad shows, wages will tend to be higher and hours shorter than they were before the new legislation. A publication of the United States Department of Labor states that "there is considerable testimony to the definite effects minimum-wage legislation in this country has had in raising women's wages.[17]

The trend towards higher wages and shorter hours in the economy will, no doubt, occur very slowly. Its speed and extent will depend partly on the general economic situation at the time the various stages of the Act go into force. Should large-scale unemployment prevail at the time of the introduction of higher minimum wages and shorter maximum hours, the effect on the rest of the economy will be much less significant than if such changes occur at times of a boom or, at least, of prosperous business conditions. To what extent the distribution of national income will change, will mainly depend on whether entrepreneurs will find it possible to shift the increase in cost, resulting from higher wages or shorter hours, to the consumer by increasing the price of their commodities. In businesses of a monopolistic nature, that may be possible, at least to a certain extent. Similarly, prices of commodities which enjoy a very inelastic demand may be raised on account of higher wages and shorter hours. In both cases, such price increases will be possible only if the production of cheaper substitutes is unlikely and when competition from abroad does not exist or is made ineffective by tariffs. On the other hand, part of the decline in profits will be counterbalanced by the increase in efficiency and productivity which will result from the Act. Although much will depend on conditions in individual industries and enterprises, it can be assumed that some, very modest, decline in profits may occur, in spite of the shift of higher costs to prices, and in spite of the favorable effects on labor productivity. To a certain, perhaps rather small, extent a redistribution of national income will occur, therefore. It will become more considerable when the final stages set down in the Act are attained. The economic effects of such a change are very desirable. Any development that tends to increase labor's share in the national product will help to reduce the instability from which the economy has suffered in the past. It will help to employ more permanently the human and natural resources which the country possesses. And, by so doing, it will help, from a different direction, to reduce the human suffering, to the elimination of which the Fair Labor Standards Act is designed to contribute.

[17] See PIDGEON, *op. cit. supra* note 7, at 101 ff; COMMONS AND ANDREWS, *op. cit. supra* note 13 at 68 ff; I. L. O., *op. cit. supra* note 8 at 233 ff; U. S. DEPARTMENT OF LABOR, WOMEN'S BUREAU, THE DEVELOPMENT OF MINIMUM-WAGE LAWS IN THE UNITED STATES, 1912-1927, Bulletin No. 61 (1928) 370 *et passim; Effect of Minimum Wage in Dry-Cleaning and Laundry Industries* (1939) 18 MO. LAB. REV. 370 ff. For similar experiences in Great Britain see I. L. O., *op. cit. supra* note 8, at 134 ff, and SELLS, *op. cit. supra* note 8, at 270.

ECONOMIC HAZARDS IN THE FAIR LABOR STANDARDS ACT

NOEL SARGENT*

The Fair Labor Standards Act has been in operation too short a time to permit valid conclusions, based upon evidence, as to its actual economic effects. To say, on the one hand, that all wage increases since the Act went into operation, or, on the other, that all lay-offs since then, are due to the Act would be a naive, and statistically insupportable, inference. It is possible, however, to make some prognostications as to what long-run effects the Act may have if it continues on the statute books, and is enforced.

I. As it stands, the Act will not affect the majority of so-called "sweatshop" conditions.

The Act excludes purely intrastate industries, thus further actually providing protection to sweatshops. The Act does permit some intrastate industries under certain circumstances to be subject to federal wage and hour control, but even this limited exception apparently does not apply to the service industries, trades, and occupations, in which lie, probably, the bulk of sweatshop labor. We must believe, therefore, either that the Act is not really intended to eliminate sweatshops or that it seeks to do so in an utterly inadequate manner. Sweatshop conditions are essentially local conditions; they vary widely from industry to industry and community to community, even within the same state. It is a problem especially difficult for federal legislation to cope with in any intelligent and effective manner.

But let us suppose that the Federal Government can reach down to the "sweatshop" level of wages. At this point—and even above it—there are marginal workers whose productive value is very limited. A minimum wage will inevitably make it impossible for some marginal laborers to find work. The higher the minimum wage is put, the greater will be the volume of government-forced unemployment; and the larger the number of persons on relief.

From a social standpoint there are a number of marginal workers in the country who actually cannot earn a certain wage. There are a certain number of marginal industries which for one reason or another cannot pay a wage which we all might believe to be a desirable wage. Society must choose whether it wishes to have those marginal industries and marginal workers continued on a basis of what might be

* Secretary, National Association of Manufacturers.

termed marginal wages, or whether it wishes to eliminate them from industry and have their production taken off the market, and support the workers on relief or by other means. To measure how great the problem may become we note that Dr. Paul Douglas states that: "If wages are pushed up above the point of marginal productivity, the decrease in employment would normally be from three to four times as great as the increase in hourly rates, so that the total income of the working class would be reduced."[1]

II. The Act is based on the unsound "purchasing power" theory.

Evidence submitted in behalf of the Act when it was under consideration in Congress indicated a belief that it would result in higher average wages, regardless of other economic forces which might be operating. Indeed, one of the apparent backgrounds of the wage-control proposal is the so-called purchasing power argument, widely advocated by many persons ever since 1929. This theory assumes that if we can only increase the money people have to buy goods with, we can assure prosperity. This was the basis of the effort in December 1929 to persuade employers to keep up wage rates at all costs. They did so with the result that millions of men became unemployed because the goods they could produce could not be sold for enough to enable anyone to hire them at the former wages. This "purchasing power" theory was also the basis of the N.R.A. In its penetrating analysis of the N.R.A., the Brookings Institution reports:

"The main outlines of the purchasing power theory are fairly simple. Employers were to raise wages and thus expand their pay rolls. The return flow of these enlarged payments in the form of demand for the products of industry would increase the physical volume of goods and services sold. . . . Employers must not raise their selling prices as fast or as far as they raised wage rates. . . . In practice it did not work out as planned. . . . The anticipated lag of price advances behind wage increases did not in general occur. . . . On the average, prices rose ahead of wage rates."[2]

The federal wage and hour control measure seems to be predicated upon the same economic error; it is in substance a new N.R.A. from the standpoint of its economic basis, even if the method used differs.

The purchasing power theory of wages is a phase of the so-called underconsumption theory as to the cause of the business crisis—an inability to sell part of the goods produced at a price equal to or exceeding their cost. It is sufficient to say at this point that the theory is condemned by leading economists. Thus, Dr. Wilhelm Röpke, of Istanbul University, perhaps the world's principal authority on business cycles, concludes:

"If we pump purchasing power into the hands of the masses without treading the path to inflation, there must occur a diminution in the incomes of entrepreneurs, so it is only the composition of demand and not its total amount that is changed. . . . The question arises here also whether the composition of demand as determined by the distribution of income and its changes is not an important factor for the explanation of

[1] THEORY OF WAGES (1934) 501.
[2] THE NATIONAL RECOVERY ADMINISTRATION (1935) 757-760.

disturbances of economic equilibrium. . . . Let us take . . . the idea that the share of the workers' income in the total national income is too small . . . to secure equilibrium in the economic system. Then the objection immediately presents itself that the crisis is preceded not by a slack time but by a boom in which the income of the worker rises along with the total income. In the same vein it must be objected that, contrary to what the underconsumption theory would lead us to expect, it is the consumers' goods industries which are usually the least and the last affected by the depression. . . . This is really fatal to the idea that it is the appearance of a deficiency of consumers' purchasing power which is the factor bringing the boom to an end."[3]

And Dr. Gustav Cassel of Stockholm University, in the present author's opinion one of the world's leading economists, declares in his *On Quantitative Thinking in Economics* (1935):

"Certain charlatan teachings that have recently taken a conspicuous place in popular discussion of social economy as well as in political agitation . . . particularly in the United States, lay much stress on a supposed insufficiency of income for buying the whole product of the community. . . . This conclusion is wrong. It has simply overlooked that the cost of production of new capital goods for replacement represents an income for those engaged in this reproduction. This income—which is at disposal for buying the net product—is equal to the total value of the replacement goods, and thus also to the total sum written off for depreciation and debited to the cost of the net product. Thus total income suffices for buying total net product."[4]

III. Wage and hour control legislation cannot be fully effective unless accompanied by economic planning in other directions.

Even if we could accept the "purchasing power" theory as sound, there are still many grave difficulties involved in proposals to establish federal wage control. For example, there are only three directions in which a wage rate can be fixed, namely:

(1) At the free-market price. If it is fixed here, then obviously it is a waste of time to have any board or legislation at all.

(2) Below the free-market price. If it is fixed here then the demand for labor and its supply get out of adjustment. The demand for labor will be increased and its supply lowered. The eventual answer would have to be the rationing of consumers, in order to limit the demands for goods and thus reduce the demand for labor—thus limiting the freedom of consumers.

(3) Above the free-market price. If the wage rate is fixed here then once again we will find the demand for labor and its supply getting out of adjustment. The demand for labor will be reduced and its supply increased. To meet this situation the government would have to compel an increase in production, regardless of the demand for goods at the price involved.

Perhaps these extremes would not result. But it is certain that government cannot control wages without soon being faced with the necessity of controlling prices, either directly, or by seeking to control such other cost factors as taxes, insurance, interest rates, and so forth. Gardiner Means, one of the Government's economic advisers, writes:

[3] CRISES AND CYCLES (1936) 86-90. [4] 66, 67.

"Partial planning may easily lead to uneconomic use of resources and a distortion of economic relationships. . . . Industrial policy-making for each industry could, obviously, have very disturbing results if the relations among industries were not part of the picture."[5]

Dr. Alvin H. Hansen, formerly economic adviser to the State Department, was a member of the Columbia University Committee on Economic Reconstruction which in 1934 pointed out that the true economic goal should be "planned flexibility" and that this could only be accomplished by governmental "orderly adjustment" or continuous control of such "fundamental cost groups" as (1) interest charges, (2) depreciation, (3) railroad and public-utility rates, (4) basic fuel and metal-products prices, (5) taxes, (6) wage rates.[6]

In other words, this Act can only be fully effective, if at all, with complete economic planning of other economic factors as well. It is impossible to inject an act of Congress into an economic machine and stop one major part of it—the free movement of prices—and expect the rest to go on as before. Once government starts to interfere in direct economic control, it is difficult to stop doing so.

IV. It will be administratively difficult or impossible to administer an Act which includes so many factors in the determination of wages.

In addition to the general problem of the economic point at which to fix wages there are other practical difficulties. Consider, for instance, the problem of differentials. The Act provides that eleven factors may be considered in fixing wage rates:

(1) "Reasonable cost" of board, lodging and other facilities furnished employees.
(2) "Conditions in the industry."
(3) Economic condition of an industry.
(4) Competitive condition of an industry.
(5) Wage which would "substantially" curtail employment in an industry.
(6) Transportation costs.
(7) Living costs.
(8) Production costs.
(9) "Wages established for work of like or comparable character by collective labor agreements."
(10) "Wages paid for work of like or comparable character by employers who voluntarily maintain certain minimum wage standards."
(11) Impaired earning capacity of employees.

The magnitude of the problem involved is further realized when we find that the United States Census of Occupations reports gainful workers in over 625 classifications; the United States Employment Service now uses approximately 6,300 separate occupational classifications.

Here is the dilemma—if we do not provide differentials we are nonrealists, refusing to recognize the fact that differentials have developed and exist, and that ignoring them would almost completely alter and perhaps even wreck the complicated and delicate economic machine.

[5] WARE AND MEANS, THE MODERN ECONOMY IN ACTION (1936) 199.
[6] *Report*, pp. 50, 217. [7] §5.

If we recognize 600 or 6,000 separate occupational classifications and attempt to fix wage rates for them under the eleven differential standards in this Act, there will be an administratively difficult task, one probably incapable of being carried out, with the result that administration will break down and the whole measure be repudiated in practice if not in legislation—but with great economic harm occurring in the meantime. This is a perfectly huge task—an enormously complicated economic planning responsibility—to impose at any time, and particularly so when business is still subject to relatively new burdens imposed by the Social Security Act and the National Labor Relations Act.

V. There will be a tendency under the Act to decrease the spread between skilled and unskilled wages.

Will a legal minimum wage tend to become the maximum wage? I think there is no doubt that such a tendency will exist, although only in a relatively few cases will the minimum and maximum actually be identical. What will happen is that the percentage spread between the minimum and maximum will become less. The attempt by legislation, as proposed in Section 18 of this Act, to prevent this development by administrative fiat, is as economically ridiculous as the statement made to King Canute by his courtiers that the tide would recede at his mere command. Certainly it has been the experience in foreign nations where minimum-wage legislation has existed that over a period of years there is an increasing tendency for the percentage spread between minimum and maximum wages to decrease.

It is the author's opinion that there has been for many years a tendency for the percentage differential between the wages of skilled and unskilled workers to decrease. A federal wage and hour act will simply speed up this natural economic tendency. Not only is this true, but it is further promoted by the constant tendency where minimum-wage legislation exists "to merge into a tendency towards the general regulation of wages.[7]

VI. Rigidities in our economic system will be increased by the Act.

If the Federal Wage-Hour Act becomes fully operative it will establish additional rigidities in our economic system which would make the next depression worse than it otherwise need be. These rigidities would be first in the field of wages and second in the field of prices.

We need less rigidity or stability, instead of more. We need more flexibility. It is a mistake to adopt measures which tend to "freeze" either wages or prices into our economic system. The result of such rigidities is to make economic adjustments more difficult and a depression more likely or more severe when prompt economic adjustments would be economically desirable.

In this connection attention is directed to these observations by Dr. Wilhelm Röpke:

"The success of direct interferences with the structure of production, costs, and prices, aimed at the mitigation of the trade cycle is extremely dubious. . . . The most severe

[7] Douglas, *Wage Theory and Wage Policy* (1939) 39 INT. LAB. REV. 322; see also Reddaway, *Australian Wage Policy* (1938) 37 *id.* 315.

of all depressions has descended upon us just in a moment when capitalism has been disfigured by an excess of interferences of all kinds (. . . wage regulations . . . restrictions on the movement of capital, etc.) until it is practically unrecognizable. . . . It is . . . palpable that we should speak not of a 'crisis of capitalism' but a 'crisis of interventionism.' "[8]

Indeed, from the standpoint of basic economics, easily the worst effect of this Act might be the establishment of wage and price rigidities which would intensify the severity of our next business recession. Secretary Wallace and Mr. Gardiner Means have especially stressed during the past few years the necessity of price flexibility, with which wage flexibility is intricately connected.

Dr. Willford I. King, former president of the American Statistical Association, soundly observes that:

". . . the higher prices made necessary by the advances in wage rates will inevitably tend to lessen the volume of sales of their products. The extent to which sales will shrink in the case of any particular product will depend upon the elasticity of the demand for that particular product. The demand for bread is relatively inelastic, hence the falling off in sales resulting from a 50 per cent increase in the price of bread is likely to be relatively slight. On the other hand, a 50 per cent rise in the price of beefsteak will cause a marked shrinkage in the volume which can be marketed. *In practically all products, however, a rise in price is accompanied by some decline in sales volume* (italics added).

"As sales volume shrinks, the need for workers to replace these products obviously lessens, and workers are laid off. A fundamental lesson which workers in general have yet to learn is that they, as well as their employers, have a vital interest in keeping down wage costs per unit of output. This is true both from their positions as employees and their position as consumers. Consumers include, of course, employers, employees, independent workers, and the dependents of these classes. The idea that, in some way, high wage costs can be passed on to some mythical body of consumers outside the classes mentioned is, of course, based upon the most careless kind of reasoning. Higher wage costs react adversely therefore, upon both employers and employees, not only in their capacity as producers, but also in their capacity as consumers.

". . . Unduly high wage costs per piece are burdensome to the consumers of the products, and hence these consumers are unable to purchase as large a volume of the goods produced by the labor in question as they could buy if wage costs per unit were lower."[9]

In our analysis of the economic aspects of the wage-control provisions of the Fair Labor Standards Act, we can well ponder the following opinions expressed a few years ago by one of the country's citizens most prominently in the limelight today:[10]

"Private control of a monopolistic nature which could limit production according to any plan or formula being impossible, it may be worth while to consider in passing the possibility of Government control of this industry.

"It is difficult to conceive how any such control through political agencies could function without putting strait-jackets upon the supply of industrial energy that would bring paralysis of initiative and enterprise in all other business lines. The quantity . . . needed for the factories and homes of America cannot be determined in advance, simply is not subject to exact forecast because it varies from day to day with the ebb and flow of business, not only in America but around the world. The writer is convinced that such an

[8] *Op. cit. supra* note 3, at 159-160.

[9] *Wage Rates in the General Welfare* (1939) 29 AM. ECON. REV. 34, 39, 47.

[10] THE MINERS FIGHT FOR AMERICAN STANDARDS, 21-22.

indeterminate quantity cannot be regulated artificially in a manner even to promote stability, much less insure it. . . .

"The only manner in which we can hope to have the . . . industry function in tune with the rest of the industrial system, is to see that . . . (it) remains at all times subject to the same economic laws which are simultaneously determining the volume of all production and distribution of commodities."

These statements were written by John L. Lewis, president of the United Mine Workers, in 1925.

VII. Dividing the volume of work will not increase production and living standards.

The theory of the Fair Labor Standards Act seems to be that employee welfare can be increased by compulsory sharing of existing work, and that this will be promoted by heavy penalties on overtime employment. Let us assume that the Act is fully operative in all industries, and that average hours of work are reduced, but the same weekly pay maintained (for that seems to be the formula). One of two results might follow—(1) additional workers would be employed, but since the unit cost of production would be higher the consumers would pay more; or, (2) since the consumer would pay more he would buy less, demand would fall off and so would employment. Here again we find the Brookings Institution has thus summarized the principles involved:

"The much advocated 30-hour week with 40-hours pay would produce an increase in prices and the cost of living calculated to widen much further the disparity between the income of the country and the prices of the things it buys. . . ."[11]

If the employers do not raise prices to offset the higher cost, they will be ruined and go out of business and employment will be decreased; but if they do raise prices, there will be no extra purchasing power to buy the products, the total demand will be decreased, and once again employment will suffer. No one can whisk away the inseparable connection between costs, output, and prices. To increase costs before there is increased demand is to put the cart before the horse, and run the risk of making matters worse instead of better.

Increased living standards for the country as a whole can result only from an increased volume of work; they will not be increased by simply dividing up the existing volume of work. We need national policies which will increase the total volume of work done instead of trying to maintain the volume of work at existing shrunken levels. The Brookings Institution has soundly pointed out that:

"The universal 30-hour limitation advocated in some quarters, with a practically attainable average of 27 or 28 hours, would be clearly a freezing of partial unemployment with a low standard of living."[12]

The Chairman of the Federal Reserve Board, M. S. Eccles, gave this sound caution in a public statement on March 15, 1937:[13]

[11] *Op. cit. supra* note 2, at 843.
[12] *Id.* at 838.
[13] N. Y. Times, March 16, 1937, p. 9, col. 1.

"Increased wages and shorter hours when they limit or actually reduce production are not at this time in the interest of the public in general or in the real interest of the workers themselves."

Certainly, we cannot assist in the elimination of poverty by reducing the supply of goods to be consumed.

Prof. J. M. Clark, of Columbia University, former president of the American Economic Association, says that:

"A compulsory increase of wages, by increasing costs of production, might lead to restriction of output in the attempt to protect profits—in short, to just the opposite of the desired effect."[14]

Dr. Thomas N. Carver, of Harvard University, another former president of the American Economic Association, summarizes his observations as follows:[15]

"The hope often expressed, that shortening the working time of both labor and capital, with no diminution of wages or interest, would relieve unemployment, is a vain hope, based upon insufficient analysis."

Yet another effect of hour-control legislation must be considered—that the supply of labor available for production of war supplies would be so restricted if a war should come, that the hour provisions of the present Act would presumably have to be either repealed or suspended.

VIII. Competition with foreign producers either at home or abroad will be made more difficult by the Act.

How will this Act, when fully operative, affect our national volume of trade? There are two principal groups of manufacturers and employees directly interested. First, those manufacturers and employees engaged in making goods which are exported in considerable quantity. If their production costs and resulting selling costs are raised, then the exports of competitive products will decrease. Second, those manufacturers and employees engaged in making goods which either actually or potentially are in competition in American markets with goods from abroad. If American production and selling costs are increased then the difficulty of selling in competition with imports of foreign-made goods will be increased. The result would be decreased production and employment in many American industries.

IX. Such legislation favors larger business enterprises.

This Act will in the final analysis tend to favor so-called "big business" as compared to "little business." No general rule can be laid down—many small plants pay top wages in their industries—but generally speaking the big company tends to pay higher wages than its small competitors. The result is that, if costs are raised by wage and hour control, the larger company will, as a rule, have its costs increased least; the smaller company will be given an additional competing handicap.

In actual practice the Act will inevitably result in greater proportional cost increases to companies with lower average wages than to those with higher average

[14] *Report, Committee on Economic Reconstruction*, Columbia Univ. 1934, p. 125.
[15] *The Theory of the Shortened Working Week* (1936) 26 AM. ECON. REV. 451, 462.

wages, and this will favor the bigger companies in general. Under the N. R. A., for example, the Government could have rejected code provisions—wages, hours, or any others—which gave advantages to the larger companies; but that was not the actual experience. Who does not recall the report of the so-called Darrow Commission, appointed by President Roosevelt, which reported that the N. R. A. definitely and substantially favored "big business" and handicapped "little business"?

X. The Act will tend to establish new geographical relationships.

The Act now states that "no minimum wage rate shall be fixed solely on a regional basis"—but does provide that comparative transportation, living, and production costs shall be taken into account. But after 1945 there will be a flat nation-wide minimum wage. It seems inevitable that this will have some effect in lessening competitive advantages of some sections of the country as compared with others, and will possibly reverse, or at least eliminate, trends in the location of industry in the past forty years.

While perhaps not as fundamentally important as the foregoing listing of some of the long-run effects of federal wage-hour legislation, yet there are some economic effects which are worth noting.

(1) The Act has resulted in forcing payment of overtime to clerical and office workers who customarily work relatively short hours, and have steady employment, but occasionally must work longer hours, as in getting out reports and audits. Many covered employees should, as a matter of fact, be excluded. Thus, the Administrator of the Act says in a letter of March 31, 1939, to Senator Thomas:

"The reasons which dictated the enactment of Federal minimum-wage and maximum-hour standards for lower-paid workers are inapplicable to these higher-salaried employees."

(2) The Act has resulted in increased use of time-clocks in industrial offices, a tendency which is both resisted and regretted by many leading personnel experts.

(3) The Act provides exemptions for hour agreements made with certain labor unions, but does not extend the same benefits to similar, or better, agreements made with other groups of employees, or existing under stipulation in a company.

(4) The Act has prevented technical workers from working voluntarily week-ends or evenings in order to increase their knowledge and efficiency; practically every large company has many cases of this kind.

(5) Many companies who have paid certain groups of workers on a weekly, or even monthly, basis are being compelled to employ them on an hourly basis; this is resented by the employees.

(6) There is good reason on economic grounds to believe that in determining what constitutes "seasonal employment" the Administrator of the Act has not sufficiently taken into account such factors as the weather handicaps involved (lumbering in New England and the Northwest), or the periods of special availability of supplies (the packing industry).

HOW THE SUPREME COURT MAY VIEW THE FAIR LABOR STANDARDS ACT*

Introduction

The subject to be discussed in this article is the constitutionality of the Fair Labor Standards Act. Constitutionality is not the kind of thing, however, which may be determined *in vacuo* merely by an examination of the statute and the Constitution. Nor can it be discovered entirely through a reading of judicial decisions. As we all know, the Constitution and the cases mean different things to different people, and the constitutionality of a law ultimately depends upon what the Constitution means to the people who are the ultimate arbiters—the justices of the Supreme Court. The constitutionality of the Fair Labor Standards Act thus will be determined by what the justices who will pass upon the question think the Constitution means.

The task of the lawyer in advising clients as to the validity of the Fair Labor Standards Act is to predict what the Supreme Court justices will say about it. The lawyer customarily states his views as to what "the Court" will hold. Since in this case it is quite unlikely that the members of the Court will all come to the same conclusion,[1] he might more appropriately conjecture as to what the justices are likely to say on both sides of the question. Then all that need be done is to guess how many justices will subscribe to each opinion, and the question as to whether the Act is constitutional will be resolved.

The writers suggest that the following opinions might be written by members of the present Court. The opinion holding the Act valid has been prepared by Mr. Stern. The opinion holding the Act invalid has been prepared by Mr. Smethurst. Neither opinion is labeled here as "majority" or "minority." The fact that the opinion holding the Act constitutional comes first is not of significance in that respect.

* This article is composed of two parts, one written by Robert L. Stern and the other by R. S. Smethurst. The "Introduction" and "Statement of the Case" were prepared jointly by the two authors. Biographical data may be found in footnotes appended to the writers' names, *infra* at pp. 433 and 444.

[1] Apart from Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935), there have been from two to four dissenting votes in almost every important recent decision under the commerce and due process clauses. Railroad Retirement Board v. Alton R. R., 295 U. S. 330 (1935) (5-4); Carter v. Carter Coal Co., 298 U. S. 238 (1936) (5-4); Morehead v. People *ex rel.* Tipaldo, 298 U. S. 587 (1936) (5-4); West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937) (5-4); Highland Farms Dairy, Inc. v. Agnew, 300 U. S. 608 (1937) (5-4); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937) (5-4); Carmichael v. Southern Coal & Coke Co., 301 U. S. 495 (1937) (5-4); Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453 (1938) (5-2); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938) (6-2); Currin v. Wallace, 59 Sup. Ct. 379 (1939) (6-2); Mulford v. Smith, 59 Sup. Ct. 648 (1939) (6-2); National Labor Relations Board v. Fainblatt, 59 Sup. Ct. 668 (1939) (6-2); United States v. Rock Royal Co-operative, Inc., 59 Sup. Ct. 993 (1939) (5-4).

The following statement of the case may be read as the introduction to each opinion.

STATEMENT OF THE CASE

Appellee was indicted by a grand jury in the Northern District of Pennsylvania for violating Subsections (1), (2) and (4) of Section 15(a) of the Fair Labor Standards Act of 1938. A demurrer to the indictment on the ground that those provisions of the statute were unconstitutional was sustained by the District Court. The case comes here on direct appeal under the Criminal Appeals Act.

The indictment alleges that appellee is a manufacturer of women's garments. He employs three hundred persons in his factory. Eighty per cent of the garments produced in January 1939 were bought by and shipped to purchasers outside the State of Pennsylvania. In the sale of such products appellee competes with many other factories in Pennsylvania and other states. During the month of January, 1939 some of the persons employed by appellee (both men and women) were paid eighteen cents an hour and were required to work fifty-four hours a week without pay for overtime. These persons were employed both in manufacturing and clerical operations, some being sewing machine operators and others stenographers. Each machine operator worked on goods sent outside of the state. Appellee also employed in his factory in that month children under sixteen years of age.

The statute provides that no manufacturer shall pay to any of his employees engaged in commerce (defined as interstate commerce) or in the production of goods for commerce less than twenty-five cents per hour, or employ any such employee longer than forty-four hours a week without specified additional compensation for overtime. Sections 6 and 7.[2] A person who violates these provisions of the Act, or who ships or sells for shipment in commerce goods produced by employees employed in violation of the above provisions is subject to fine, or after a second conviction to imprisonment. Sections 15 and 16. The Act also prohibits the shipment in commerce of goods produced in any establishment wherein "oppressive child labor" has been employed during the thirty days preceding shipment. Section 12. Oppressive child labor is defined, *inter alia,* to mean the employment in factories of children under sixteen years of age. Section 3(l). Similar penalties are imposed for violation of this provision.

The indictment charges appellee, in separate counts, (a) with selling and shipping to other states garments produced by (1) sewing machine operators and (2) stenographers paid eighteen cents per hour; (b) with selling and shipping to other states garments produced by (1) sewing machine operators and (2) stenographers employed fifty-four hours per week without compensation for overtime; (c) with selling and shipping to persons in other states garments produced while appellee was employing in his factory children under sixteen years of age; (d) with paying (1) sewing machine operators and (2) stenographers engaged in the production of goods

[2] The minimum wages are to be increased and the maximum hours are to be decreased after the first year.

shipped out of the State of Pennsylvania eighteen cents per hour; (e) with requiring (1) sewing machine operators and (2) stenographers engaged in producing goods shipped out of the State of Pennsylvania to work fifty-four hours per week without compensation for overtime.

In his demurrer to the indictment appellee contended that the provisions of the statute upon which the indictment was based were unconstitutional as applied to him in that they (1) did not come within the commerce power of Congress; (2) violated the Tenth Amendment; and (3) deprived him of liberty and property in contravention of the due process clause of the Fifth Amendment. The District Court sustained the demurrer on each of the above grounds.

(A) AN OPINION HOLDING THE ACT CONSTITUTIONAL

Robert L. Stern*

1. The Validity of the Act under the Commerce Clause

(a) *Sections 15(a)(1) and (4).* These subsections of Section 15(a) prohibit interstate sales and shipments of goods produced by oppressive child labor or by labor employed at less than the minimum wage or for more than the maximum hours. Such sales and shipments are, of course, interstate commerce. The prohibition of such sales and shipments is on its face a regulation of interstate commerce. *Mulford v. Smith,* 59 Sup. Ct. 648 (1939).

That Congress may under the commerce clause prohibit interstate commerce has been recognized in numerous decisions of this Court. *Mulford v. Smith, supra; Champion v. Ames,* 188 U. S. 321 (1903); *Hipolite Egg Co. v. United States,* 220 U. S. 45 (1911); *Hoke v. United States,* 227 U. S. 308 (1913); *Brooks v. United States,* 267 U. S. 432 (1925); *Gooch v. United States,* 297 U. S. 124 (1936).[3] It is equally clear that the power to prohibit interstate commerce includes the power partially to restrain such commerce, or to impose conditions upon the privilege of engaging in it. *Mulford v. Smith supra; Currin v. Wallace,* 59 Sup. Ct. 379 (1939); *United States v. Rock Royal Co-operative, Inc.,* 59 Sup. Ct. 993 (1939); *Electric Bond & Share Co. v. Securities and Exchange Commission,* 303 U. S. 419 (1938). In the *Electric Bond & Share* case we stated (see page 442):

"When Congress lays down a valid rule to govern those engaged in transactions in interstate commerce, Congress may deny to those who violate the rule the right to engage

* A.B., 1929, Williams College; LL.B., 1932, Harvard University. Special Assistant to the Attorney General, United States Department of Justice. Author of *That Commerce Which Concerns More States Than One* (1934) 47 Harv. L. Rev. 1335 and *Separability and Separability Clauses in the Supreme Court* (1937) 51 Harv. L. Rev. 76.

[3] In the first case arising under the commerce clause, United States v. The Brigantine William, Fed. Cas. No. 16,700, 28 Fed. Cas. 614 (1808), District Judge Davis, who was the youngest member of the Massachusetts convention which ratified the Constitution, upheld the embargo on American trade with England and France—the most sweeping prohibition of commerce in our history.

in such transactions. *Champion v. Ames,* 188 U. S. 321; *United States v. Delaware & Hudson Co.,* 213 U. S. 366, 415; *Brooks v. United States,* 267 U. S. 432, 436, 437; *Gooch v. United States,* 297 U. S. 124; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.,* 299 U. S. 334, 346, 347."

It is contended, however, that the prohibition against interstate shipment of goods made under sub-standard labor conditions regulates production rather than commerce, and that its purpose and necessary effect are to control labor conditions in the state in which the commodity is produced. A similar argument was made in *Mulford v. Smith, supra,* wherein it was contended that the regulation of the amount of tobacco which could be marketed was intended to and did in fact control the amount which would be produced. We there held that "the motive of Congress in exerting the power is irrelevant to the validity of the legislation."[4]

The regulation of interstate commerce here will have no more direct effect upon production than was true in the *Mulford* case. That decision and many others indicate that an exercise of federal power is not invalid because of its effect upon transactions which might lie outside the sphere of federal regulation. *United States v. Carolene Products Co.,* 304 U. S. 144, 147 (1938); *Railroad Retirement Board v. Alton R. R.,* 295 U. S. 330, 371 (1935); *Veazie Bank v. Fenno,* 8 Wall. 533, 548 (U. S. 1869); *McCray v. United States,* 195 U. S. 27, 60 (1904); *Sonzinsky v. United States,* 300 U. S. 506 (1937); *cf. Magnano v. Hamilton,* 292 U. S. 40 (1934). The Constitution does not state that the power of Congress to regulate commerce may not be exercised if Congress has other motives or purposes than the protection of commerce itself, or because the regulation may have an effect upon intrastate activities.

It is true that Congress may not "under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government." *McCulloch v. Maryland,* 4 Wheat. 316, 423 (U. S. 1819). Whether prohibition of interstate shipments could ever be deemed a mere "pretext" for the regulation of interstate commerce need not be determined here.[5] Clearly the Fair Labor Standards Act presents no such problem. The purpose of the regulation was to prevent use of the channels of interstate commerce in such a way as to spread low labor standards throughout the country. Section 2 of the statute declares that the existence in the production of goods for commerce of sub-standard labor conditions "causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states" and "constitutes an unfair method of competition in commerce." Even without any such finding by Congress we could take judicial notice of the fact, as a matter of present-day common knowledge, that producers with sub-standard and harmful labor conditions frequently have an advantage over their competitors in selling goods in interstate commerce, and that it is the use of the channels of interstate commerce by such producers that to a con-

[4] STORY, COMMENTARIES ON THE CONSTITUTION (5th ed. 1891) §§965, 1079, 1081, 1089.

[5] We will be able to deal with the far-fetched illustrations referred to by appellee, such as the prohibition of the interstate transportation of goods produced by divorced persons, when and if such cases arise. Such statutes would find obstacles in the due process clause.

siderable extent is responsible for the continued and widespread existence of such conditions throughout the nation.

In *Mulford v. Smith, supra,* we stated:

". . . Any rule, such as that embodied in the Act, which is intended to foster, protect and conserve that commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce, and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce."

Thus, even if we assume that an additional connection with interstate commerce —a purpose or effect related to commerce—is essential to the validity of a direct regulation of such commerce, the Fair Labor Standards Act would be valid. The power of Congress to set standards to govern competition in interstate commerce cannot be doubted. That power extends to both interstate and intrastate practices which affect interstate competition. Numerous cases under the Sherman, Clayton and Federal Trade Commission Acts have applied the commerce clause to intrastate transactions which restrain or otherwise affect interstate competition.[6] *A fortiori* may Congress regulate interstate commerce itself, as it has done here, in order to raise the standards of interstate competition.

We have also held that Congress may prevent goods produced by prison labor from being shipped in interstate commerce because of the effect upon labor standards in the state of destination. *Kentucky Whip & Collar Co. v. Illinois Central R. R.,* 299 U. S. 334 (1937). Although that case dealt with a statute which supplemented state legislation, the paramount power of Congress over interstate commerce is not limited in scope to the furtherance of state policy. *United States v. Hill,* 248 U. S. 420 (1919); *Clark Distilling Co. v. Western Maryland Ry.,* 242 U. S. 311 (1917). The detrimental effects of prison labor are of the same kind as that of child labor or adult labor paid low wages. If Congress may take steps to prevent one, it can take similar action with respect to the others.

Appellee urges upon us the authority of *Hammer v. Dagenhart,* 247 U. S. 251 (1918), which held unconstitutional a 1916 statute (39 Stat. 675) prohibiting the interstate transportation of child-made goods. That statute might be distinguished from the present Act on the ground that Congress has here made specific findings, based upon facts of common knowledge, as to the existence of a relationship between the statutory prohibition and interstate commerce. Cf. *Hill v. Wallace,* 259 U. S. 44 (1922), and *Chicago Board of Trade v. Olsen,* 262 U. S. 1 (1923). But we are reluc-

[6] Northern Securities Co. v. United States, 193 U. S. 197 (1904); Swift & Co. v. United States, 196 U. S. 375 (1905); United States v. Patten, 226 U. S. 525 (1913); Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 (1925); Van Camp & Sons v. American Can Co., 278 U. S. 245 (1929); American Can Co. v. Ladoga Canning Co., 44 F. (2d) 763 (C. C. A. 7th, 1930), *cert. denied,* 282 U. S. 899 (1931); Federal Trade Commission v. Eastman Kodak Co., 7 F. (2d) 994 (C. C. A. 2d, 1925), *aff'd,* 274 U. S. 619 (1927); Chamber of Commerce v. Federal Trade Commission, 13 F. (2d) 673 (C. C. A. 6th, 1926); Temple Anthracite Coal Co. v. Federal Trade Commission, 51 F. (2d) 656 (C. C. A. 3d, 1931).

tant to hold that such findings are essential to the validity of a law. Cf. *United States v. Carolene Products Co., supra.* In substance the statute declared unconstitutional in *Hammer v. Dagenhart* is identical with the child labor provisions in the present Act. And the prohibition against transporting goods produced by adults working under sub-standard conditions cannot be distinguished in theory from the ban upon shipping goods produced by children. For this reason we deem it necessary to consider whether *Hammer v. Dagenhart* should be followed or overruled.

Four Justices of this Court dissented from that decision. It has been subjected to a barrage of criticism by secondary authorities.[7] Examination of the majority opinion in the light of subsequent decisions of this Court reveals that each of the basic premises upon which the opinion rests has already been repudiated or abandoned.

The majority in *Hammer v. Dagenhart* stated that Congress did not have the power to prohibit the interstate movement of "ordinary" or "harmless" commodities (pp. 270-272). A similar contention was held "inadmissible" in *Kentucky Whip & Collar Co. v. Illinois Central R. R., supra,* and it is clearly inconsistent with what we said recently in *Mulford v. Smith, supra.* The Constitution contains no such limitation; to limit the power to prohibit commerce to "harmful commodities" is to read into the Constitution what is not there.

As a corollary to the argument just considered, the opinion suggested that the power to restrict interstate transportation may be exercised only when necessary to avoid "the accomplishment of harmful results" (p. 271), and that the Child Labor Act cannot be deemed to fall within that category. This argument appears to be no more than a restatement of the first; it is clear from the opinion that only "harmful commodities" (such as impure food, lottery tickets, liquor, and women) were considered capable of producing "harmful results." Moreover, the opinion does not find that the use of child labor and dissemination of its effect through the channels of interstate commerce is not an evil, but rather suggests the contrary (p. 275). Thus, even if the premise that the power of Congress is limited to the prevention of "harmful results" be accepted, we cannot say that sub-standard labor conditions or child labor do not produce such results. Cf. *Kentucky Whip & Collar Co. v. Illinois Central R. R., supra.*

It was stated in *Hammer v. Dagenhart* that Congress may not "control interstate commerce" in order to prevent "unfair competition" between manufacturers in states with different standards of labor (p. 273). The Court seemed to be of the opinion

[7] See *Some Legal Aspects of the National Industrial Recovery Act* (1933) 47 HARV. L. REV. 85, 88; Corwin, *Congress's Power to Prohibit Commerce, a Crucial Constitutional Issue* (1933) 18 CORN. L. Q. 477, 496; Gordon, *The Child Labor Law Case* (1918) 32 HARV. L. REV. 45; Cushman, *The National Police Power Under the Commerce Clause of the Constitution* (1919) 3 MINN. L. REV. 452; Powell, *The Child Labor Law, the Tenth Amendment and the Commerce Clause* (1918) 3 SO. L. Q. 175; Bikle, *The Commerce Power and Hammer v. Dagenhart* (1919) 67 U. OF PA. L. REV. 21; Note (1918) 17 MICH. L. REV. 83. But see Bruce, *Interstate Commerce and Child-Labor* (1919) 3 MINN. L. REV. 89; Miller, *Federal Regulation of Hours of Labor in Industry* (1933) 11 TENN. L. REV. 247. The articles written before the Court's decision are especially interesting. See Brinton, *The Constitutionality of the Federal Child Labor Law* (1914) 62 U. OF PA. L. REV. 487; Lewis, *The Federal Power to Regulate Child Labor in the Light of Supreme Court Decisions, id.* at 504.

that an unfair practice occurring during the course of the production of goods to be shipped into interstate commerce could not be subjected to the commerce power no matter how great its effect upon interstate competition.[8] This proposition is inconsistent with the many cases cited above, *supra,* note 6, as well as with the basic doctrine that Congress may protect interstate commerce against injury "no matter what the source of the dangers which threaten it." *Second Employers' Liability Cases,* 223 U. S. 1, 51 (1912); *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 37 (1937).

Hammer v. Dagenhart declared that "a statute must be judged by its natural and reasonable effect" (p. 275), and that since the prohibition against interstate shipments of child-made goods necessarily affected child labor it was not a regulation of interstate commerce. We have pointed out above that the constitutionality of a regulatory statute is to be determined by what it regulates, not by what it affects.

The opinion further held that the regulation of labor conditions in manufacturing enterprise was a purely local matter falling within the powers reserved to the states under the Tenth Amendment. But conditions of employment are not "purely local"; when they directly affect interstate commerce, they are subject to the regulatory control of Congress. *National Labor Relations Board v. Jones & Laughlin Steel Corp., supra.* Nor can it be said that the Tenth Amendment, which reserves to the states only the powers not granted to Congress, imposes any limitation upon the exercise by Congress of its power under the commerce clause. See page 441, *infra.*

The effect of the decision in *Hammer v. Dagenhart* was to establish a limitation upon the commerce power which is contained nowhere in the Constitution, and which is contrary to the nature of the grant as defined in cases running from *Gibbons v. Ogden,* 9 Wheat. 1, 196 (U. S. 1824), to the most recent decisions of this Court. *Kentucky Whip & Collar Co. v. Illinois Central R. R., supra; United States v. Carolene Products Co., supra; Currin v. Wallace, supra; United States v. Rock Royal Co-operative, Inc., supra; Mulford v. Smith, supra.* Since the states are precluded by the commerce clause itself from prohibiting interstate shipments of goods produced under sub-standard labor conditions, the decision created a no-man's land in which neither State nor Nation could function. The establishment of such a hiatus in governmental power is plainly contrary both to the letter and spirit of the Constitution. Story, *Commentaries,* Sec. 282; *Carter v. Carter Coal Co.,* 298 U. S. 238, 326 (1936) (dissenting opinion of Mr. Justice Cardozo).

For these reasons *Hammer v. Dagenhart* must be, and it hereby is overruled.

It is urged that the prohibitions of interstate shipment in Section 15(a)(1) and (4) are auxiliary to and inseparable from Section 15(a)(2). Since these provisions may be independently applied, and since Congress has expressed its intention that invalid parts be excised and the remainder of the Act enforced (Section 19), we do not regard them as inseparable. *Electric Bond & Share Co. v. Securities & Exchange*

[8] It was not suggested that Congress lacked the general power to prevent unfair competition in interstate commerce or that the use of cheap child labor could not be regarded as unfair.

Commission, supra. In any event, since we hold that Section 15(a)(2) is also valid, the question need not be considered further.

(b) *Section 15(a)(2).* Section 15(a)(2) presents a somewhat different problem. That clause of the Act does not merely forbid interstate shipments; it makes it unlawful for employers to pay lower wages or require longer hours (without additional compensation) than those permitted under Sections 6 and 7 of the Act. The latter sections protect employees "engaged in commerce or in the production of goods for commerce."

The acts of appellee sought to be penalized under these provisions of the Act are intrastate transactions. But such transactions may be regulated by Congress if they directly affect interstate commerce. As we said in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37, 38, "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . . The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. . . ." In that case and in subsequent decisions[9] the application of the power of Congress to labor relations in factories similar to appellee's has been repeatedly upheld.

Congress here has found that sub-standard labor conditions lead to labor disputes burdening and obstructing commerce and the free flow of goods in commerce. Section 2. The two most common causes of labor disputes which obstruct commerce are unsatisfactory wages and hours and the refusal of employers to bargain collectively with the freely chosen representatives of their employees.[10] We have sustained the power of Congress to prevent practices which bring on the second type of labor disputes, when such disputes would obstruct interstate commerce. For the same reason Congress may seek to avoid the other major cause of labor disputes which interfere with commerce.

Congress has also found that sub-standard labor conditions constitute an unfair method of competition in commerce. That an employer who pays lower wages than his rivals has a competitive advantage over them in the sale of his products is an obvious economic fact, which in many industries is not counterbalanced by the superior ability of those higher paid. Interstate sales are likely to be and frequently are diverted to the trader whose employees are paid the lowest wages. Sub-standard labor conditions thus affect interstate competition and the flow of goods in interstate com-

[9] National Labor Relations Board v. Friedman-Harry Marks Clothing Company, 301 U. S. 58 (1937); Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453 (1938); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938); National Labor Relations Board v. Fainblatt, 59 Sup. Ct. 668 (1939).

[10] DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY (1933) 362. This study, which indicates that many more strikes are caused by disputes as to hours and wages than by any other cause, is confirmed by the figures for 1919-1933 published in United States Department of Labor, (1934) 39 MO. LAB. REV. 75.

merce as greatly as do other practices long deemed subject to congressional proscription as monopolistic or unfair methods of competition. See Note 6, *supra*. It is for Congress to declare what competitive practices are unfair. As long as such practices have a substantial effect upon commerce, they are subject to the federal commerce power.

What we have said indicates that Section 15(a)(2) and Sections 6 and 7 have a constitutional basis independent of Section 15(a)(1), which prohibits the interstate transportation of goods produced in violation of the former sections. But the former may also be regarded as ancillary and supplementary to the latter.[11] Congress has the power to control activities which would normally be outside its sphere of regulation in order to make effective a law validly enacted within the granted powers. Thus, in *United States v. Ferger*, 250 U. S. 199 (1919), a statute penalizing the forging of interstate bills of lading was sustained in order to make legitimate bills more acceptable, although the forgery itself was not connected with any interstate shipment. Prohibition of the sale and manufacture of liquor which is not intoxicating has been sustained where power to prohibit the sale of intoxicating liquor existed, because the legislative body felt that control of non-intoxicating liquor was essential to the effectiveness of the primary prohibition. *Ruppert v. Caffey*, 251 U. S. 264 (1920); *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192 (1912). See also *Westfall v. United States*, 274 U. S. 256, 259 (1927); *St. John v. New York*, 201 U. S. 633 (1906).

The policy of Congress in this Act was to prevent goods produced under sub-standard labor conditions from being moved in interstate commerce and thereby affecting interstate competition and labor conditions in other states. The transportation of such goods is in itself made unlawful. But Congress is not required to withhold its hand until the employer has succeeded in starting the goods on their interstate journey. Direct prohibition of sub-standard labor conditions in the production of goods for interstate commerce (not in the production of all goods) plainly tends to effectuate and supplement the policy of keeping such goods out of commerce. We cannot say that Congress exceeded its power by adopting this means of achieving its legitimate goal.

What we have said with respect to the validity of Section 15(a)(2) applies equally to the regulation of wages and of hours, to employees directly engaged in working as machine operators on the goods produced and shipped and to stenographers on the clerical staff.[12]

With respect to the interrelationship of hours and wages Mr. Justice McKenna, concurring, stated in *Wilson v. New*, 243 U. S. 332 (1917):

"The time of service and the price of service may be said to be the reciprocals of each other—each the price of the other. There can be no real estimate of the wages one receives until it is understood what time one has worked to receive them."

[11] The existence of such an interrelationship does not imply inseparability.

[12] Section 3(j) declares that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing . . . or in any other manner working on such goods or in any process or occupation necessary to the production thereof, in any State."

Here the relationship is clear, for the statute does not impose any absolute limitation upon hours worked, but only requires that one and one-half times the regular rate of pay be given for hours in excess of the maximum.

That clerical employees who do not physically produce the goods to be shipped in commerce are essential to their production and shipment cannot be subject to doubt. A factory could not run for long if its clerical force was on strike. The payment of low wages to a clerk gives a manufacturer selling in interstate commerce just as much of an advantage over his competitors as the payment of similar wages to a factory hand. Their work is an integral part of the process of production. It thus comes within the statutory definition of "production of goods for commerce," and is subject to the commerce power. Cf. *Virginian Ry. Co. v. System Federation No. 40,* 300 U. S. 515, 556 (1937).

It is urged, as it has been in other recent cases, that application of the commerce clause to wages and hours in manufacturing enterprises which ship goods into interstate commerce will completely destroy the division of governmental functions in the United States between the States and the Nation. It is claimed that power over all commerce—interstate and intrastate—will be centralized in Congress to the exclusion of the states, and that this was not contemplated by the framers of the Constitution. The growth of the field in which the commerce power may be exercised is a direct and inevitable development of the integration of the national economic structure. Whereas in the eighteenth and early nineteenth century the business of a manufacturer was a local enterprise, today it plainly is not. The commerce clause itself, with its erasure of state lines for purposes of commerce, has been largely responsible for the expansion of commerce along interstate and national lines. The most ignorant businessman knows that competition from other states will prevent any state by itself from requiring that wages be raised in its factories, and that low wages in one state will have a direct and immediate effect upon the flow of goods in interstate commerce from that state and from other states. We suspect that only false tears are shed over the loss by the states of theoretical powers which never have been and never can be effectively exercised. We cannot shut our eyes to what all others can see. If the result is that the field of possible congressional regulation under the commerce clause is enlarged, the cause is not a change in our basic conception as to what the Constitution means, but a recognition of the vast expansion in the number and importance of those intrastate transactions which are economically inseparable from interstate commerce—of the unification along national lines of our economic system. Cf. *Stafford v. Wallace,* 258 U. S. 495, 518-519 (1922). The scope of the federal commerce power must necessarily grow as interstate commerce, unrestrainable by the states, plays an increasingly vital part in the development of the Nation.

Appellant presses upon us the decision in *Carter v. Carter Coal Co.,* 298 U. S. 238 (1936), wherein it was held that Congress lacked power to regulate hours and wages or to require collective bargaining in the bituminous coal industry. The majority

opinion in that case held that labor conditions were incidents of production, and that the power of Congress could not apply to such matters regardless of how "substantial" the effect on interstate commerce. That ruling is inconsistent both with prior[13] and subsequent[14] decisions holding that the commerce power extends to all intrastate transactions which directly or substantially affect interstate commerce, even though they occur during the course of production of goods in a factory. The cases under the National Labor Relations Act, which have upheld that Act as applied to labor relations in factories and mines shipping into interstate commerce, indicate that we no longer regard the *Carter* case as authoritative. *Schechter Poultry Corp. v. United States,* 295 U. S. 495 (1935), is plainly distinguishable. The labor conditions there subjected to regulation were those of employees in local poultry houses in New York City which sold poultry to retailers in the same city. The effect of the wages and hours of such employees upon interstate commerce is obviously much less direct and substantial than in the case at bar.

2. The Tenth Amendment

Appellee's argument that the Act violates the Tenth Amendment is disposed of by our decision that it is an exercise of the power of Congress to regulate interstate commerce. The Tenth Amendment provides only that—

". . . The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Language could not express more clearly the thought that the Amendment does not reserve to the states any part of any power which is "delegated to the United States by the Constitution," nor indicate more plainly that the Amendment does not limit the scope of any power which is delegated to the United States. The Amendment has no independent operation. It comes into effect only after a determination that an Act of Congress is not authorized under the granted powers.

That the Amendment means only what it says is demonstrated by the history of its adoption. The men who sponsored it sought only to remove any doubts that the proposed Constitution gave to the Federal Government any power beyond those enumerated,[15] and to insure that the states could continue to exercise the powers not granted to the Congress.[16]

The decisions of this Court have reiterated that the Tenth Amendment contains no independent limitation upon the powers granted to the United States but merely states the unquestioned principle that the central government is one of enumerated powers.[17] *Martin v. Hunter's Lessee,* 1 Wheat. 304, 325 (U. S. 1816); *McCulloch v.*

[13] Loewe v. Lawlor, 208 U. S. 274 (1908); Standard Oil Co. v. United States, 221 U. S. 1 (1911); Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 (1925); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, 274 U. S. 37, 48 (1927); Standard Oil Co. (Indiana) v. United States, 283 U. S. 163 (1931).

[14] See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 and cases cited in note 9, *supra.*

[15] See 2 Elliott's Debates (2d ed. 1836) 123, 124, 131, 153, 169; 3 *id.* at 442, 446, 449; 4 *id.* at 167; and 1 Annals of Congress, 441, 2 *id.* at 1897. [16] 3 Elliott's Debates, 441, 446, 449.

[17] In 1808 in United States v. The Brigantine William, *supra* note 3, Judge Davis stated with respect to the Tenth Amendment (p. 622): ". . . The general position is incontestable, that all that

Maryland, 4 Wheat. 316 (U. S. 1819); *Gordon v. United States,* 117 U. S. 697, 705 (1864); *Champion v. Ames,* 188 U. S. 321, 357 (1903); *Northern Securities Co. v. United States,* 193 U. S. 197, 344-345 (1904); *Everard's Breweries v. Day,* 265 U. S. 545, 558 (1924); *Missouri v. Holland,* 252 U. S. 416, 432 (1920); *United States v. Sprague,* 282 U. S. 716, 733 (1931); *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288 (1936); *Wright v. Union Central Ins. Co.,* 304 U. S. 502, 516 (1938).

Appellee calls to our attention language in certain of our more recent opinions[18] which by implication at least appear to indicate that the Tenth Amendment may have broader scope. We cannot regard anything said in those opinions as impairing a firmly established constitutional doctrine, or as requiring us to give to the Tenth Amendment a construction its words will not permit.

3. THE FIFTH AMENDMENT

The Fifth Amendment provides that no person may be deprived of life, liberty or property without due process of law. The rights thus protected are not absolute. Liberty, including liberty of contract, is subject to restriction by legislative action, for "the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 391 (1937); *Chicago B. & Q. R. R. v. McGuire,* 219 U. S. 549, 567 (1911). Thus, a statute will be held to violate the due process clauses in the Fifth and Fourteenth Amendments only if it bears no reasonable relation to the object sought to be obtained or is arbitrary, capricious or plainly contrary to reason. *Nebbia v. New York,* 291 U. S. 502 (1934); *West Coast Hotel Co. v. Parrish, supra.*

(a) The objects sought to be obtained in the Fair Labor Standards Act are the elimination of the evils resulting from sub-standard labor conditions and the prevention of the spread of those evils from one state to another through the channels of interstate commerce. The provisions of the Act are obviously immediately and directly related to the accomplishment of these objects.

Appellee argues that the statute fails in this respect because it bears no reasonable relationship to a legitimate object of federal regulation. The argument merely states in different form the contention that the Act does not come within any of the enumerated powers; it is answered by our holding that the Act is within the power of Congress over interstate commerce. The argument confuses the question of whether there is federal power over the transactions regulated with the entirely separate question of whether a regulation enacted pursuant to the granted powers comports with due process of law.

---

is not surrendered by the Constitution, is retained. The amendment which expresses this, is for greater security; but such would have been the true construction, without the amendment."

[18] Hopkins Savings Assn. v. Cleary, 296 U. S. 315 (1935); United States v. Butler, 297 U. S. 1 (1936); Ashton v. Cameron County District, 298 U. S. 513 (1936); Hammer v. Dagenhart, 247 U. S. 251 (1918).

(b) It is not suggested that the Act is arbitrary, capricious or unreasonable because of anything intrinsically unfair in its provisions. Nor is it urged upon us that the child labor or maximum hour sections of the Act are invalid as arbitrary or unreasonable infringements upon liberty of contract. That such provisions do not violate the due process clause has been firmly established in cases arising under the Fourteenth Amendment,[19] and the decision must be the same under the Fifth Amendment when Congress is acting within any of the enumerated powers. *United States v. Rock Royal Co-operative, Inc., supra; Nebbia v. New York, supra; Steward Machine Co. v. Davis,* 301 U. S. 548 (1937). The claim is, however, that any law fixing minimum wages for men is necessarily invalid as an arbitrary deprivation of liberty and property without due process of law, and that this statute was not intended merely to apply to women's wages. The latter, of course, is obviously true.

The Fifth Amendment nowhere states that certain types of legislation are inherently invalid, even though not arbitrary or unreasonable in fact, and we refuse to read any such limitation into it. Although this Court did for a time interpret the due process clause as if it contained such a restriction with respect to statutes fixing wages and prices (*Adkins v. Childrens' Hospital,* 261 U. S. 525 (1923); *Tyson & Bro. v. Banton,* 273 U. S. 418 (1927); *Williams v. Standard Oil,* 278 U. S. 235 (1929)), that doctrine was recognized as unsound in *Nebbia v. New York, supra,* and the *Adkins* case was expressly overruled in *West Coast Hotel Co. v. Parrish, supra.* Although the *Parrish* decision upheld a state minimum wage law for women, the principles there approved apply to men as well.[20] For regardless of the sex of the persons protected, legislation fulfils the requirements of due process if it is not arbitrary or capricious in fact. We cannot say that it is unreasonable for Congress to seek to protect both male and female workers against low wages which impair their health and that of their families, or to safeguard employers against competitors who pay their employees such wages.

For the above reasons, we hold that the District Court erred in holding the Fair Labor Standards Act unconstitutional and in sustaining the demurrer.

[19] Holden v. Hardy, 169 U. S. 366 (1898); Muller v. Oregon, 208 U. S. 412 (1908); B. & O. R. R. v. Interstate Commerce Commission, 221 U. S. 612 (1911); Sturges & Burn Co. v. Beauchamp, 231 U. S. 320 (1913); Riley v. Massachusetts, 232 U. S. 671 (1914); Bunting v. Oregon, 243 U. S. 426 (1917).

[20] The *Parrish* opinion contains considerable discussion of the necessity of safeguarding the health of women for the benefit of posterity. As one commentator has stated, "The influence of male workers in this respect can hardly be dismissed as insignificant." (1939) 52 Harv. L. Rev. 647.

(B) AN OPINION HOLDING THE ACT UNCONSTITUTIONAL

R. S. SMETHURST*

On appeal from the decision of the District Court the Government contends (1) that the statute is primarily a regulation of commerce, (2) that any regulation of local matters is secondary and merely incidental, (3) that the local matters so regulated, namely, wages, hours and the employment of minors, are all matters which directly and substantially affect interstate commerce, and (4) that the statute does not offend against the Fifth Amendment.

THE ACT AS A REGULATION OF COMMERCE

In attacking the decision below, the Government has argued that Section 15(a)(1) of the statute clearly stamps it as a commerce regulation. That Section prohibits the interstate sale, shipment or delivery of goods produced in violation of Section 6 or 7 of the Act. The same contention is made with respect to Section 12, prohibiting the interstate sale, shipment or delivery of goods produced in establishments employing "oppressive child labor." With emphasis upon these provisions, we are told the statute is obviously a regulation of commerce among the several states and clearly within constitutional bounds.

Prior decisions of this Court go far toward sustaining this contention. We have repeated at the risk of becoming trite, that the power to regulate commerce is the power to prescribe the rule by which that commerce shall be governed. *Gibbons v. Ogden,* 9 Wheat. 1, 196 (U. S. 1824); *The Daniel Ball,* 10 Wall. 557, 564 (U. S. 1871); *County of Mobile v. Kimball,* 102 U. S. 691, 696 (1880). We have gone further. In recent years this Court on numerous occasions has held that the power to regulate includes the power to prohibit such commerce. As we said in *Kentucky Whip & Collar Co. v. Illinois Central R. R.,* 299 U. S. 334, 346 (1937):

". . . The power to prohibit interstate transportation has been upheld by this Court in relation to diseased livestock, lottery tickets, commodities owned by the interstate carrier transporting them, except such as may be required in the conduct of its business as a common carrier, adulterated and misbranded articles, under the Pure Food and Drug Act, women, for immoral purposes, intoxicating liquors, diseased plants, stolen motor vehicles, and kidnaped persons."

This series of decisions found its logical culmination in *Mulford v. Smith,* 59 Sup. Ct. 648, decided April 17, 1939. In that case we held that the power to regulate commerce included the power to regulate the supply of tobacco to move in interstate commerce by imposing heavy penalties upon tobacco marketed in excess of quotas fixed by the Secretary of Agriculture.

* B.S., Harvard University, LL.B., George Washington University. Member of the District of Columbia Bar. Associate Counsel, National Association of Manufacturers. Contributor to legal periodicals.

In view of these principles now established it can no longer be argued that the power to regulate commerce does not include the power to prohibit. Consequently if the statute before us merely prohibited interstate commerce in forbidden articles, the argument of the Government would have the support of an imposing and unbroken line of authority in the cases cited.

While Appellee would distinguish such cases, we are not called upon to do so, for Appellee relies primarily on the contention that the true import of the statute does not appear from mere examination of Sections 12 and 15(a)(1) alone. It is argued that the real regulation prescribed can be determined only by reading those sections in connection with other portions of the Act. Counsel for Appellee refer in particular to Section 3 (definitions), Sections 6, 7 and 8 (pertaining to minimum wages and maximum hours of employment), Section 11 (inspections and records), Section 13 (exemptions), Section 14 (pertaining to learners, apprentices and handicapped workers), Section 15(a), paragraphs (2), (3), (4) and (5) (prohibited acts) and to Section 16 (penalties).

In the light of these provisions, Appellee contends that the Act is first and foremost a regulation of local operations which precede the commerce subject to regulation under Section 15(a)(1). They impress upon us the argument that the chief purpose and effect of the statute is to regulate wages, hours and other conditions of employment in local enterprise; that the regulation (prohibition) of commerce is utilized to enforce or supplement this local regulation. In support of this, Appellee refers us to the familiar principle that Congress may not, under the guise of an admitted power, regulate matters not within its constitutional grant of authority. *McCulloch v. Maryland,* 4 Wheat. 316, 423 (U. S. 1819) *Linder v. United States,* 268 U. S. 5, 17 (1925); *Railroad Retirement Board v. Alton R. R.,* 295 U. S. 330 (1935); *Schechter Poultry Corp. v. United States,* 295 U. S. 495 (1935).

The Government would escape the effect of such decisions by urging that this Court is without authority to examine the motives of Congress or to defeat the exercise of an admitted power by consideration of its incidental effect upon subjects outside its orbit. *Mulford v. Smith, supra.*

The issue thus drawn is clear. Is the statute essentially a regulation of interstate commerce which only incidentally includes subjects local in character or is the statute primarily a regulation of wages and hours of employment in local enterprise reinforced by the prohibition against interstate commerce in articles produced under lower standards? We think it clearly the latter.

It is true, as the Government contends, that an admitted power cannot be denied merely because it indirectly or incidentally controls matters which Congress has no power to regulate directly. While application of this principle has frequently evoked disagreement, the principle itself has never been disputed. Cf. *Mulford v. Smith, supra; Hammer v. Dagenhart,* 247 U. S. 251 (1918); *Bailey v. Drexel Furniture Co.,* 259 U. S. 20 (1922).

Appellee has referred us to the decision in *Hammer v. Dagenhart, supra,* to justify

examination of the purposes of the statute now before us as revealed in its background and legislative history. The Government contends, however, that *Hammer v. Dagenhart* has been so modified by subsequent cases that it must now be considered overruled. We think each argument misconstrues the principle there applied and its subsequent application under particular circumstances.

The issue before us in the original *Child Labor Case* was clearly expressed in the dissenting opinion of Mr. Justice Holmes when he said:

"The question, then, is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the states in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state."

The majority, speaking through Mr. Justice Day, expressly recognized that the Court had "neither authority nor disposition to question the motives of Congress in enacting this legislation." They did find on the face of the statute a regulation of "a purely local matter to which the Federal authority does not extend."

Mr. Justice Holmes, and those members of the Court who concurred in his dissent, believed the majority had condemned the statute for an indirect and incidental local regulation necessarily imposed upon those who would ship their products in interstate commerce. The minority believed this incidental effect did not make the statute any less a commerce regulation.

The incidental or speculative effect of the first Child Labor Law appeared as direct and certain in the Child Labor Tax Law before this Court in *Bailey v. Drexel Furniture Co., supra.* After examination of the statute, the Court, through Mr. Chief Justice Taft, concluded (at page 37) that:

". . . In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"

Criticism of the *Dagenhart* case has been directed, not against the fundamental principle underlying it, but against the willingness of that Court to restrain the exercise of the commerce power because of its incidental regulation of production. We are not now faced with that danger. The incidental local regulation implicit in the first *Child Labor Case* is found in the statute before us to be clear, explicit and undisguised. Similarly, it bears no resemblance whatever to the Act of Congress sustained in *Mulford v. Smith, supra,* wherein we emphasized that:

"*The statute does not purport to control production* (italics added). It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a

regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse."

While the Fair Labor Standards Act of 1938 expressly prohibits interstate commerce in goods produced under the conditions proscribed in Sections 6, 7 and 12, it does more. Section 6 prohibits employment at less than the stipulated minimum wages or for hours longer than the specified workweek. While these prohibitions extend to any employee "engaged in commerce," they also apply to any employee "engaged in the production of goods for commerce." The term "produced" is defined in Section 3(j) to include the mining, manufacturing, processing, or handling of goods, and for the purpose of the Act an employee shall be deemed to be engaged in production if engaged in "any occupation necessary thereto." The term "goods" is defined in Section 3(i) to include articles of commerce of any character, including "any parts or ingredients thereof."[1]

Sections 5 and 8 set forth elaborate plans for fixing minimum wages industry by industry to expedite attainment of the 40 cent minimum ultimately contemplated by the statute. Section 13 provides for numerous and detailed exemptions and Section 11 requires the keeping of payroll records of information pertinent to any detailed regulation of wages and hours of employment.

Section 12 prohibits the interstate sale, transportation or delivery of any goods produced in an establishment in or about which oppressive child labor has been employed at any time within thirty days prior to removal of the goods. Section 3(l) defines "oppressive child labor" and vests authority in the Department of Labor to specify occupations deemed hazardous.

If these provisions leave doubt of the true nature of the regulation, such doubt is definitely removed by Sections 15 and 16. Section 15(a)(2) declares unlawful the *employment* of any person in violation of Section 6 or 7. Paragraph (4) likewise declares unlawful any act prohibited in Section 12. For these infractions of the law, Section 16 provides the penalties, criminal and civil, and Section 17 vests jurisdiction in District Courts to restrain any act or practice prohibited in Section 15.

When employment under the prohibited conditions may lead to imposition of such penalties, can it be said the statute does not regulate local affairs or that the regulation of such matters is merely incidental to a primary regulation of commerce? We think the answer is obvious. The statute regulates far more than subjects heretofore included in the broadest concept of commerce. It regulates activities and practices which are the essence of production, and for which there is no constitutional

[1] As indicative of the scope of the Act, Appellee has referred us to the views of those charged with its administration, particularly Interpretative Bulletin No. 5, December 2, 1938, wherein it is stated that: ". . . Employees are engaged in the production of goods for commerce where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. If, however, the employer does not intend or hope or have reason to believe that the goods in production will move in interstate commerce, the fact that the goods ultimately do move in interstate commerce would not bring employees engaged in the production of these goods within the purview of the Act. . . ."

sanction unless it can be said that these local practices directly and substantially affect interstate commerce. In *Kidd v. Pearson,* 128 U. S. 1, 21 (1888), we said:

"If it be held that the term (commerce with foreign nations and among the several states) includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry."

See also, *Schechter Poultry Corp. v. United States, supra,* p. 547; *Carter v. Carter Coal Co.,* 298 U. S. 238, 304, 317, 327 (1936); and *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 300 U. S. 1 (1937).

REGULATION OF PRACTICES AFFECTING COMMERCE

The Government has anticipated this conclusion by arguing in the alternative that low wages, excessive hours and the employment of minors directly and substantially burden interstate commerce. Consequently our attention is directed to Section 2 of the Act. The Government contends that low wages, long hours and the employment of minors burden and obstruct commerce and are therefore subject to regulation. Specific reference is made to the Congressional findings that these labor conditions lead to labor disputes which burden and obstruct commerce; that their existence constitutes an unfair method of competition in commerce and interferes with the orderly and fair marketing of goods.

On the basis of these findings, the Government invokes the familiar principle that Congress may protect commerce from injury arising at any source. While the standards required by the statute before us are not imposed, as in the National Labor Relations Act, only when observance of contrary conditions may "affect commerce," the Government contends the same result is achieved by Sections 6 and 7 prescribing wage and hour standards for employees "engaged in the production of goods for commerce." The authorities relied upon include such landmarks as *National Labor Relations Board v. Jones & Laughlin Steel Corp., supra,* and cases therein cited.

Appellee, however, stands squarely upon our decision in *Schechter Poultry Corp. v. United States, supra,* and in *Carter v. Carter Coal Co., supra.*

Decisions of this Court support with adequate authority the contention of the Government that the power to regulate commerce includes the power to protect that commerce from injury from whatever source it comes. No immunity attaches merely because the injury arises in production or manufacture. While activities may be local in character when separately considered, they are not thereby removed from federal control if their relation to interstate commerce is so close and substantial as to require regulation or restraint to protect that commerce. *Schechter Poultry Corp. v. United States, supra; National Labor Relations Board v. Jones & Laughlin Steel Corp., supra.*

This Court has constantly emphasized, however, that federal intervention is justified only if it clearly appears that there is a close and substantial relation between interstate commerce and the local activities sought to be controlled. *Santa Cruz Fruit Packing Co. v. National Labor Relations Board,* 303 U. S. 453 (1938); *Schechter Poultry Corp. v. United States, supra.* The commerce power cannot be distorted to bring under federal rule complete control of local affairs which, because of our growing and complex economic system, create temporary disturbance or dislocations indirectly affecting interstate commerce. "Activities local in their immediacy do not become interstate and national because of distant repercussions." *Schechter Poultry Corp. v. United States, supra,* p. 554.

The distinction between what is "direct" and "substantial," as contrasted with the "remote" and "indirect," never has been defined except by degree and the usual process of inclusion and exclusion. Nevertheless the distinction is real. Upon its preservation depends continuance of our constitutional system. *Santa Cruz Fruit Packing Co. v. National Labor Relations Board, supra; National Labor Relations Board v. Jones & Laughlin Steel Corp., supra.*

While imaginary cases may be cited to obscure the line, the facts before us leave no doubt upon which side this statute must fall. The issue before us now is the same as that presented in *Schechter Poultry Corp. v. United States, supra,* and *Carter v. Carter Coal Co., supra.* Neither the facts before us, nor the arguments presented by the Government have induced us to deviate from our prior decisions. While we have moved far in recent years toward a broad expansion of federal authority, we are not at liberty to alter our dual system by interpretation based upon theoretical arguments of cause and effect.

The soundness of our decision is apparent when we contrast this statute with the Act of Congress sustained in the *Labor Board Cases.* In upholding the validity of the National Labor Relations Act, we were faced with a long record of experience with labor disputes. That record demonstrated beyond any reasonable doubt that there was a direct connection between unfair labor practices causing labor disputes and restraint upon interstate commerce.

As we stated in the *Jones & Laughlin* case:

". . . it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic."

Cf. *Santa Cruz Fruit Packing Co. v. National Labor Relations Board, supra,* and *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197 (1938).

In the light of history and experience, Congress had ample authority to protect commerce from the ravages of costly and disruptive strikes, even though the regulatory scheme was incomplete and imperfect as a deterrent to industrial strife. Our decision in the *Jones & Laughlin* case was the logical advance from previous decisions under the Sherman and Clayton Acts. Cf. *Coronado Coal Co. v. United Mine Workers,* 268 U. S. 295 (1925).

Nevertheless, in each of the decisions in the *Labor Act Cases* we have carefully preserved in full vigor the principle applied (and its application) in *Schechter Poultry Corp. v. United States, supra* and *Carter v. Carter Coal Co., supra.* Our decision in those cases was carefully distinguished by the Government in argument upon the validity of the National Labor Relations Act.[2]

In the *Schechter* case we had occasion to pass upon the validity of federal regulation of wages and hours as authorized in the National Industrial Recovery Act. In that case the Government argued that hours and wages affected prices and that low wages and long hours, by reducing costs, resulted in price cutting and demoralization of the price structure of commodities moving in interstate commerce. Those arguments were met by a unanimous decision of this Court declaring "that the attempt . . . to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power." In the opinion written by Mr. Chief Justice Hughes this Court pointed out that:

". . . The argument of the government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power."

In a separate concurring opinion, Mr. Justice Cardozo voiced even more vigorous objections to this attempted extension of federal power. Referring to the regulation of wages and hours of labor in intrastate transactions, Justice Cardozo described its fallacious theory in colorful language:

". . . There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors through its territory; the only question is of their size.' Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. Cf. *Board of Trade v. Olsen,* 262 U. S. 1. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."

[2] The then Solicitor General, Mr. Stanley Reed, in arguing National Labor Relations Board v. Jones & Laughlin Steel Corp., stated: "It is not necessary that the *Carter case* should be overruled, if this act is upheld. Nor is it necessary to think that if we can go this far in protecting commerce from obstructions because of the power to regulate strikes with intent or with the necessary effect of obstructing commerce, that we need open the door to go further into control of wages or hours or conditions of labor. It may well be that wages or hours or conditions of labor, as such, are beyond the power of Congress, because to interfere with them would be a violation of the due-process clause; or we may say that wages and hours are so distinct and separate from interstate commerce that they do not have a direct effect upon it under any circumstances, while here the rights of labor which are protected fit directly into labor conditions which result directly in interferences and obstructions to interstate commerce." SEN. DOC. No. 52, 75th Cong., 1st Sess. (1937) 128.

This separate opinion was concurred in by Mr. Justice Stone.

Fundamentally the same arguments are pressed upon us in the instant case. These arguments, based upon the Congressional findings and declaration of policy, allege further that existence of substandard labor conditions leads to labor disputes burdening and obstructing commerce, constitutes an unfair method of competition in commerce and interferes with the orderly and fair marketing of goods. While we may take judicial knowledge of the fact that labor disputes often involve controversy over appropriate wage scales and hours of employment, we find nothing in the attempted regulation of minimum wages which would have even a perceptible tendency to eliminate the causes of such disputes.

As we said in *National Labor Relations Board v. Jones & Laughlin Corp., supra:*

"Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. . . ."

The purpose of the statute then before us was to diminish the number of such disputes by affording definite protection to labor's acknowledged right to organize. The whole machinery of that Act was geared to the accomplishment of that purpose. The existence of the evil found evidentiary support in the statutory plan enacted to meet it.

The Fair Labor Standards Act is in no way comparable, and we are not bound by a mere legislative declaration not effectuated in the slightest degree by the statutory provisions which follow. This statute is neither drafted nor designed to deal with labor disputes as such or to eliminate their cause. The statute before us purports to regulate basic minimum wages. It does not pretend to touch the levels usually involved in controversies between organized labor and employers.[3] Nor does it provide any machinery whatever for dealing with disputes over wage and hour standards which may lead to strikes. It does not prohibit unfair labor practices in individual instances when such practices are found to "affect" commerce. The theory of the statute is to protect the underprivileged; those to whom the benefits of collective bargaining have not yet been extended.[4] It proceeds on the general assumption that payment of less than twenty-five cents an hour directly burdens commerce, irrespective of the number of employees receiving less and regardless of the scale of wages paid above the minimum.

[3] Studies of the Department of Labor reveal that union agreements covering a substantial portion of the women's clothing industry provide generally for a 35-hour week; in some instances 37½ hours. This industry is cited as one instance "of an almost industry-wide prohibition of overtime work." See *Hours of Work in Collective Agreements* (1938) 46 Mo. Lab. Rev. 232.

Another survey discloses that average hourly earnings in this industry are $1.06 for men and $.56 for women. Average weekly earnings equal $35.52 for men and $17.41 for women. See *Women in Industry* (1938) 47 *id.* at 1272.

[4] In reporting S. 2475, which became the Fair Labor Standards Act of 1938, the Committee Report submitted by Senator Black pointed out that: "It is only those low-wage and long-working-hour industrial workers, who are helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage." Sen. Rep. No. 884, 75th Cong., 1st Sess. (1937).

The argument that low wages and long hours constitute an unfair method of competition in commerce has already been adequately answered by this Court in *Schechter Poultry Corp. v. United States, supra* and *Carter v. Carter Coal Co., supra.* While competition may be made unequal by differences in labor costs, that is not necessarily so. As we pointed out in the *Schechter* case, the cost of labor is merely one element in the final cost of articles competing in interstate markets. Payment of low wages and employment for excessive hours may affect competition in the labor market, but those unable to bear the greater cost of higher standards suffer most in bidding for the more skilled and efficient. Such practices affect commerce indirectly, if at all, only to the extent lower labor costs affect prices. It is common knowledge, however, that the impact of labor costs on prices is diluted not only by other and equally important elements of cost, but by factors relating to demand. To sustain this extension of federal authority requires more than a specious economic theory. The possible connection between low wages and the price the article will ultimately bring in the market place is too remote to be direct, and too speculative to be substantial. *Schechter Poultry Corp. v. United States, supra.*[5]

We must conclude, therefore, that the statute before us is invalid to the extent it seeks to compel Appellee to observe standards of wages and hours of employment with respect to its employees engaged in productive operations or occupations necessary thereto. While reluctant to deny effect to Section 12, pertaining to the employment of minors, we have concluded it likewise cannot survive the test we must apply.

Section 12 does not merely prohibit interstate commerce in goods produced with the labor of minors. The products of Appellee's establishment would be barred from commerce even though the minors employed performed duties having only a remote relationship to actual production. If they are employed "in or about the establishment," the output of that factory would be barred from the channels of interstate commerce.

The local nature of the regulation is even more apparent upon casual examination of Section 3, subsections (i) and (l). By defining goods to include "any part or ingredient," it is obvious that the prohibitions extend far beyond regulation of the manufacturer or dealer actually shipping a finished product in commerce. Furthermore, the authority vested in the Department of Labor by Section 3(l)(2) belies the claim that Section 12 is essentially a regulation of interstate commerce. It is local regulation pure and simple. While it has not been seriously contended that the employment of minors directly burdens or "affects" commerce, we think it obvious that any possible effect is too remote and insignificant to sanction federal regulation.[6] *Hammer v. Dagenhart, supra,* and *Schechter Poultry Corp. v. United States, supra.*

[5] Even economists disagree on the basic theories involved without considering provable results. *Cf.* King, *Wage Rates in the General Welfare,* and Douglas, *The Effect of Wage Increases Upon Employment* (1939) 29 AM. ECON. REV., 34 and 138 (No. 1, pt. 2). See also, Sargent, *Economic Hazards in the Fair Labor Standards, supra,* pp. 422-430.

[6] While current information seems to be lacking, we are told that in 1930 some 197,621 minors under 16 years of age were gainfully employed in non-agricultural occupations, but estimates vary as to the number in manufacturing or productive enterprise covered by this Act. Statistics recently published by the National Industrial Conference Board indicate that approximately 60,000 minors under 16 years of age are employed in manufacturing.

The Government nevertheless urges that we should still give effect to Section 15 and sustain those counts of the indictment based on alleged interstate shipment of goods produced in violation of Sections 6 and 7. The same contention is made with reference to Section 12 forbidding interstate traffic in goods produced by oppressive child labor. The apparent position of the Government is that these Sections stand alone and are clearly separable from those Sections having no application.

While we must heed the legislative declaration of separability expressed in Section 19, we cannot sanction imposition of these penalties when the standards upon which they are based have no application to Appellee. As we have previously stated, Sections 12 and 15 prohibit interstate traffic in goods produced in violation of Section 6 or 7 or with oppressive child labor defined in Section 3(l). We have found that these Sections can have no application to the business of Appellee. Consequently it cannot be said that the products of Appellee were produced in violation of any provision of the Fair Labor Standards Act. Since the shipment of its products was not within the prohibitions of Section 12 or 15, its status is no different than would exist if its operations were expressly exempted by the terms of the statute itself. We are not, therefore, required to consider the question of separability.

The Fifth Amendment and Due Process

Appellee has argued also that the statute before us infringes upon fundamental rights protected by the Fifth Amendment. In the briefs and arguments, the Fair Labor Standards Act has been distinguished from the minimum wage legislation sustained in *West Coast Hotel Co. v. Parrish,* 300 U. S. 379 (1937).

We are told that the statutory standards for minimum wages and maximum hours are arbitrarily fixed without reference to the necessities of health and without any consideration whatever of living costs, competition or other factors required under any similar state regulation thus far approved. Our attention has likewise been directed to Section 18 of the Act, interpreted to condemn downward adjustment of wages above the absolute minima imposed by the statute, or the lengthening of existing hours of work already lower than the statutory standard prescribed. It is argued with considerable force and merit that the statute is not truly a minimum wage regulation, but an attempt to regulate all wages.[7]

While we were impressed with the substance of such contentions, we are not now called upon to decide their worth. We have already concluded that the Fair Labor Standards Act can have no application to Appellee or its employees for the reason that regulation of their wages, hours or employment of minors cannot be sustained as a regulation of commerce. We will pass upon these further questions if and when they arise.

The decision of the District Court sustaining the demurrer to the indictment is hereby affirmed.

[7] See U. S. Department of Labor, Wage and Hour Division, Interpretative Bulletin No. 5, October 21, 1938.

STATE FAIR LABOR STANDARDS LEGISLATION

LOUISE STITT*

Since Congress passed the Fair Labor Standards Act of 1938, the title of that Act has come to be used to designate a comprehensive type of labor law intended to regulate a variety of industrial conditions that generally in the past have been controlled by specific laws, such as minimum-wage laws, hour laws, and child-labor laws. The National Recovery Administration was the inspiration of the Fair Labor Standards Act. Ever since the United States Supreme Court decided that the NRA violated principles of the Constitution, proponents of federal labor legislation have anticipated the day when the Congress would find a way of providing wage and hour protection for workers in interstate commerce that was legal and more satisfactory than that lost with the passing of the National Industrial Recovery Act. The Fair Labor Standards Act regulates not only wages and hours but child labor, and it has been interpreted by the Administrator to apply to industrial home work.

The first real state fair labor standards acts were passed 26 years ago in 1913 by California, Oregon, and Washington. No one in those days thought of calling these laws by the title that has since become popular. They were known then and still are known as minimum-wage laws for women and minors. Under them, nevertheless, administrators were given the authority not only to fix minimum wages but to establish "maximum hours of work consistent with the health and welfare of women and minors" and "standard conditions of labor demanded by" their well-being.[1] The purpose of these early laws was to protect the health and morals of industrial women and minors by regulating not only their wages and hours but the sanitary and safety conditions of the places in which they were employed. Though they do not prohibit harmful child labor nor establish statutory minimum-wage rates, as does the Fair Labor Standards Act, the authority given the administrator to require healthful physical working conditions exceeds that of the Federal Act. Today nine states[2] have this type of law for women and minors.

State fair labor standards laws modeled after the Federal law do not exist. Up to

* B.A., 1910, M.A., 1925, Ohio State University; attended New York School of Social Work, Columbia University, also University of Wisconsin and University of Pennsylvania. Director, Division of Minimum Wage, Women's Bureau, United States Department of Labor. Formerly Assistant Professor of Economics, Ohio State University. Author, *Benefits of Minimum Wage Legislation for Women* (U. S. Dept. of Labor, 1937). Contributor to periodicals on the subject of minimum wage legislation.

[1] CALIF. GEN. LAWS (Deering, 1931) Act 3613, §6.

[2] California, Colorado, Kansas, Louisiana, North Dakota, Oklahoma, Oregon, Utah, and Washington.

the present, no state has passed such legislation. Twenty-five states,[3] Alaska, the District of Columbia, and Puerto Rico regulate the wages of women through state minimum-wage laws; all states but Alabama, Florida, Iowa, and West Virginia regulate the hours that women may work, and many regulate the hours of men in certain occupations. Laws protecting children against too early or harmful employment have been passed by all the states, and 18[4] control industrial home work by law. But so far no state regulates all these labor conditions by means of a single piece of legislation similar in pattern to the Federal Act.

Though it was estimated upon the passage of the Fair Labor Standards Act that approximately 11,000,000 workers would be covered by the provisions of the new law, it was realized that probably more than twice that number would remain unprotected. Workers employed in intrastate commerce are not affected by the Federal law. Few state hour laws and only one minimum-wage law[5] apply to men, and many states have not yet passed minimum-wage laws even for women.

The answer to this problem of the unprotected worker seemed to many friends of labor legislation to be the passage by the states of laws similar to the Federal Act that would apply to men and women employed in intrastate industries. It was remembered that in the days of the National Recovery Administration 23 states followed the example of the Federal Government by passing state recovery acts. Public reaction to the passage of the Fair Labor Standards Act of 1938 was so favorable that many persons believed that the states would be quick to supplement the federal law with "little fair labor standards acts." The legislatures of 44 states were to be in regular session during the early months of 1939, thus affording a favorable opportunity for the introduction of such bills in a large number of states.

The Secretary of Labor therefore appointed a committee of state labor commissioners and representatives of the American Federation of Labor and of the Congress of Industrial Organizations to draft a State bill, which would meet the needs of the states and appropriately supplement the Federal Act. To avoid confusion with the Federal Act, and because the title, Fair Labor Standards, describes less accurately the state bill as drawn than it does the Federal law, the new draft became known officially as "Suggested Language for a State Wage and Hour Bill."[6] The bill was approved in November 1938 by the National Conference on Labor Legislation, called annually by the Secretary of Labor, and became the basis for the similar bills adopted

[3] Arizona, Arkansas, California, Colorado, Connecticut, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, and Wisconsin. On April 21, 1939, a bill that applies only to women and minors employed in the fish-packing industry was approved in Maine. The Alaska law was approved March 9, 1939.

[4] California, Connecticut, Illinois, Indiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, West Virginia, and Wisconsin.

[5] The Oklahoma minimum-wage law is the only state minimum-wage law that covers men as well as women. The Supreme Court of that State, however, ruled on March 21, 1939, that the application of the law to men is unconstitutional, not because the principle is unsound but because of a faulty title. Associated Industries of Okla. v. Industrial Welfare Commission, 90 P. (2d) 899.

[6] The bill is set forth in Appendix II of the Proceedings of the Fifth National Conference on Labor Legislation, also on pp. 8011-8018 of the C. C. H. Labor Law Service.

somewhat later by the American Federation of Labor and the Congress of Industrial Organizations.

In its broad outlines the State wage and hour bill follows the pattern of the Federal Fair Labor Standards Act. Both provide for statutory rates covering men as well as women, and for the appointment by the administrator of official bodies, known under the Federal Act as industry committees and in the State bill (Section 5) as wage boards, to recommend for specific occupations wages higher than those established by statute. There was much discussion by the Secretary's committee of the desirability of including in the State draft the "flat-rate" provision. This type of state legislation had always been frowned upon by labor-legislation experts in the past. It was known that it was not the original intention to include this provision in the Federal Act, but that its inclusion was the result of compromise. In the three states having so-called flat-rate laws, they have for the most part proved very ineffective. For obvious reasons wages fixed by a legislature are almost bound to be low and inflexible, and the initial expense of setting up an adequate inspectorate to police an entire state covered at one time by a general wage law has proved so overwhelming that little or no enforcing has been done and the laws have tended to become dead letters. However, as the main purpose of the new State wage and hour legislation was to supplement the Federal law, and as the statutory rate has the advantage of guaranteeing complete coverage quickly, the committee decided that in so fundamental a matter as this the two laws should correspond.

So the State bill (Sections 3 and 4), like the Federal Act, provides for statutory rates that increase automatically over a period of seven years, and for progressively shorter weekly hours during a two-year period. Under the Federal law industry committees may not recommend wages higher than 40 cents an hour, but the State bill (Section 6(c)) places no such limitation on state wage boards and the amounts that they may propose. Neither the Federal Act nor the State draft actually limits the number of hours an employee may work. For the curtailment of long hours and the spread of employment both depend on the requirement that time worked in excess of the weekly hours stipulated in the statute shall be paid for at one and one-half times the employees' regular wage rates. The Federal Act does not require overtime payment for daily hours, but the State draft would require employers to pay one and one-half times the regular rate for hours worked in excess of eight in any one day.

The Federal Fair Labor Standards Act and the State wage and hour law come under very different governmental powers; therefore, the declared policy of the State bill and the Federal Act and the principles laid down in each to guide the administrators in determining minimum wages are quite different. The Congress found its justification for regulating wages and hours in the Commerce Clause of the Federal Constitution. The policy of the Federal Act is to eliminate as rapidly as possible labor conditions detrimental to the health, efficiency, and general well-being of the workers because these conditions constitute an unfair method of competition,

lead to labor disputes that obstruct the free flow of goods in commerce, and cause commerce to be used to spread such labor conditions among the workers of the states. Industry committees are authorized to recommend to the administrator the highest minimum-wage rates (not to exceed 40 cents an hour), compatible with economic and competitive conditions, which will not substantially curtail employment in an industry. The State bill, coming as it does under the police power of the States, attacks the problem much more directly, and has as its declared policy the protection of the general welfare and of the health, efficiency, and well-being of workers through the establishment of minimum-wage and maximum-hour standards (Section 1). Wage boards are required when recommending minimum wages to take into account "(1) cost of living, (2) the wages established in the State for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing, and (3) the wages paid in the State for work of like or comparable character by employers who voluntarily maintain reasonable minimum-wage standards" (Section 6(c)).

The exemptions under the State draft are far less numerous than those authorized by the Federal Act. The State bill exempts from the wage and hour provisions persons "employed (1) in a bona-fide executive or professional capacity (as such terms are defined and delimited by regulations of the commissioner of labor), (2) in agriculture, and (3) in domestic service in a private home" (Section 2(d)). The payment of higher overtime rates is not required in cases of extraordinary emergencies, such as those resulting directly from fire, flood, or storm (Section 4(b)).

The final draft of the Fair Labor Standards Act shows the influence of special groups that for various reasons sought and secured exemption of their employees from some or all of the provisions of the Act. In addition to the exclusion from the wage and hour regulation of employees in bona-fide executive, administrative, professional, and local retailing capacities, or in retail or service establishments the greater part of whose selling or servicing is in intrastate commerce, or as outside salesmen, or in agriculture, seamen, workers engaged in any kind of employment connected with aquatic forms of animal and vegetable life, employees of certain types of small-town newspapers, individuals engaged in the processing of agricultural or horticultural commodities or the making of dairy products if carried on in the area of production, all are exempt, as are local trolley, motor bus, and interurban electric-railway employees and employees of carriers by air who are subject to provisions of the Railway Labor Act.

The hour regulation does not apply to workers engaged in the first processing of milk into dairy products, in the ginning and processing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugar cane, or maple sap into sugar (but not refined sugar) or into syrup. Employees covered by certain sections of the Interstate Commerce Act and the Motor Carrier Act of 1935 also are exempt from the hour provision of the Fair Labor Standards Act. In seasonal industries for a period of 14 weeks the overtime rate need not be paid until the work-

week exceeds 56 hours or the workday 12 hours. This same provision, requiring overtime only after 56 hours a week or 12 a day, applies to employees covered by bona-fide collective bargaining agreements which provide that no worker shall be employed more than 1,000 hours during any period of 26 consecutive weeks, nor more than 2,000 hours during any period of 52 consecutive weeks.

The State Wage and Hour Bill, unlike the Fair Labor Standards Act, does not provide for the regulation of child labor. Experts in the field of child labor believed it would be preferable to encourage each state to amend its existing child-labor law to equal the standards set by the Federal law than to include such provisions in the general State bill. There is no reference in the Federal Act to industrial home work. The Administrator has ruled,[7] however, that workers on goods intended for interstate commerce, even though they are employed in their own homes, must be paid the minimum wages applicable to all workers covered by the law. The law does not classify workers on the basis of the places in which they work. The State Wage and Hour Bill is much more definite than the Federal in its provisions concerning industrial home work. The labor commissioner is given the power to issue regulations and orders necessary to carry out the provisions of the law. Such regulations may include the restriction or prohibition of industrial home work.

Probably because trade unionists sat on the drafting committee, the State bill carries a section which provides that nothing in the act shall be deemed to interfere with the right of employees to bargain collectively through representatives of their own choosing for wages higher than those established under the act or for hours that are shorter.

Both the Federal Act and the State bill provide against wage discrimination on the basis of age or sex.

The Federal Act permits the administrator of the law to use the services and the employees of state labor departments, provided these departments agree to cooperate, for the purpose of enforcing the Fair Labor Standards Act, and to reimburse these state agencies for their services. Because special legislation is required in some states to permit state departments to accept federal funds, a section (13) was written into the State bill authorizing state agencies to assist and cooperate with the Wage and Hour Division of the United States Department of Labor in the enforcement of the Fair Labor Standards Act within the state, and to be reimbursed by the Federal Department for the cost of such services.

The State wage and hour bill adopted later by the Congress of Industrial Organizations is practically like that drafted by the Secretary's committee. The only real difference between the two bills is that the CIO draft does not exempt professional nor domestic workers from the provisions of the law. Though the American Federation of Labor's draft does not follow so closely the committee's language for a State wage and hour bill as does that of the CIO, the provisions are almost identical. While the two other bills do not mention employees of the State, the AFL bill

[7] Wage and Hour Division, Release, April 13, 1939; see §6 of the Act.

specifically exempts such workers. The AFL bill does not release employers from the obligation of paying the time and one-half overtime rates even during emergencies, as do the other drafts. Wage-board members are limited to nine by the AFL bill, while no limitation is placed on the number of board members in the other bills. The provision of the Federal Act limiting the minimum wage that can be established through wage-board procedure to 40 cents an hour is followed in the AFL draft. No wage board may recommend less than 30 cents an hour. The American Federation of Labor takes the position that wages above 40 cents should be set through collective bargaining and not by law.

Copies of these three drafts were distributed widely throughout the states by the two national labor organizations and by the United States Department of Labor. The purpose was, of course, to get these bills into the hands of state legislators who would sponsor them in their own legislatures. It was hoped that the bills would be carefully adapted to local conditions, but that the general structure would be maintained, so that the conformity with the Federal Act that had been the object of the drafting committee could be assured in state legislation. Forty-two[8] wage and hour bills of some type were introduced into 29[9] of the 44 state legislatures that were in regular session during the early months of 1939. In some states three or four bills were introduced, each differing from the others in some major or minor respect. If only those bills are included in the count that may fairly be called fair labor standards bills, inasmuch as they follow the federal plan of regulating wages through the device of combining statutory rates and wage-board procedure, and hours through overtime rates, 36 bills[10] were introduced into the legislatures of 26 states.[11]

Eighteen[12] of these 36 bills followed for the most part the draft approved by the Fifth National Conference on Labor Legislation, five others (Maryland, Massachusetts, Michigan, New York, and West Virginia) included professional and domestic workers as recommended by the Congress of Industrial Organizations, and eight[13] were modeled after the American Federation of Labor bill. Three bills patterned directly from the Federal Fair Labor Standards Act were introduced into two state legislatures.[14] In California two bills were introduced that would amend the present minimum-wage law for women by extending it to men and by introducing the

[8] The writer cannot be absolutely certain of the accuracy of her statement concerning the number of wage and hour bills introduced in the State legislatures this session. She has had access to the bills furnished by the Commerce Clearing House, and there are 42 of these at present. This count does not include companion bills (the same bill introduced into both houses of the legislature) nor bills later substituted for the original bill.

[9] Arizona, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

[10] See note 8 *supra*.

[11] Of the 29 states in which wage and hour bills were introduced, Kansas, North Carolina, and South Carolina are the 3 in which bills that conform with the definition of a fair labor standards bill as used in this paragraph were not introduced.

[12] Arizona (2 bills), California, Colorado, Idaho, Indiana, Maine, Massachusetts (2 bills), Montana, New Hampshire, New Jersey, New Mexico, Tennessee, Utah, Washington, Wisconsin, and Wyoming.

[13] Connecticut, Delaware, Illinois, Maryland, Massachusetts, Missouri, Ohio, and Rhode Island.

[14] Connecticut (2 bills) and Missouri.

flat-rate provision. In addition to these 36 bills, six that would regulate hours and establish minimum wages by statute with no provision for modification of the rates through wage-board recommendations were introduced into five[15] state legislatures.

It is impossible to make a hard and fast classification of these bills, because in very few cases was any one of the model drafts accepted without some modification by the legislators who became sponsors of the bills. In some states joint committees representing labor, employer, and public organizations carefully scrutinized the proposed bills in light of their local conditions and agreed upon important changes that were incorporated in the bills as finally introduced. However, the grouping used above gives a fairly satisfactory idea of the type of the 42 wage and hour bills introduced into the 1939 State legislatures.

It is interesting to note to what extent these bills followed the standards set by the Federal Fair Labor Standards Act or suggested in the State wage and hour drafts. Seventeen of the 42 bills provide for higher statutory minimum wages than those to be found in the flat-rate provisions of the Federal Fair Labor Standards Act. Eight of the 11 States[16] in which bills have been introduced providing for higher rates are states that already had minimum-wage laws for women. This fact may explain in part the willingness of the legislators to sponsor bills with the higher rates, because the wages established under state minimum-wage laws generally are higher than the statutory rates provided by the Federal Fair Labor Standards Act and repeated in 22 of the state wage and hour bills. Ninety percent of the minimum rates set by the states under minimum-wage laws for women exceed 25 cents, which is the minimum for the first year under the Fair Labor Standards Act, and 30 cents, the federal rate for the next six years, is equaled or exceeded by 75 per cent of the state rates for women.

Though none of the State wage and hour bills provides for a minimum rate of less than 25 cents an hour, three[17] bills would establish wage standards lower than those permitted by the Federal Act. All these bills are so-called flat-rate bills, which make no provision for increases in rates through wage-board procedure. The South Carolina bill and one of the two West Virginia bills provide for a flat hourly rate of 25 cents without the escalator clause of the Federal Act that authorizes automatic increases above 25 cents over a period of years. The North Carolina bill, like the Fair Labor Standards Act, provides for automatic increases from 25 to 40 cents during a seven-year period, but it excepts employees of mercantile and service establishments from these increases. For these workers a flat 25-cent hourly rate is provided.

In only three southern States, North Carolina, South Carolina, and Tennessee, was any type of wage and hour bill introduced during this year's legislative session. Two of the bills introduced in these states are described in the foregoing paragraph. The

[15] Kansas, Montana, North Carolina (2 bills), South Carolina, and West Virginia.

[16] Arizona, California, Connecticut, Massachusetts, New Jersey, New York, Utah, and Washington have minimum-wage laws; Michigan and Montana have not. Maine has passed a law for one industry only.

[17] North Carolina, South Carolina, and West Virginia. The New Mexico bill was amended before it was finally killed to provide for a flat rate of 25 cents an hour and no wage boards.

Tennessee bill follows fairly consistently the suggested language for a State wage and hour bill. The second North Carolina draft is a flat-rate bill that makes no provision for wage boards but does carry the same rates as are found in the escalator clause of the Federal Act.

The provision of the three standard State drafts concerning daily hours and the basic weeks provided for in the Fair Labor Standards Act were followed in practically three-fourths of the State wage and hour bills; that is, these bills required that overtime rates must be paid for daily hours in excess of eight, and for weekly hours in excess of 44 during the first year the law is in effect, in excess of 42 hours during the second year, and in excess of 40 hours thereafter. Only four bills, two of which follow the Federal Fair Labor Standards Act, fail to place a penalty on long daily hours. Three bills would permit 48 hours of work during any one week before requiring that higher overtime rates be paid. The principle of regulating hours, both daily and weekly, through the payment of higher rates for overtime is followed in the remaining five bills, but in each the length of the basic week for which regular hourly rates are to be paid varies from the provisions of the Federal Act.

The device of controlling industrial home work through the mechanism of the wage and hour law apparently appealed to the authors of the State bills, because 35 of the 42 bills give the commissioner of labor the authority to restrict or prohibit industrial home work. As to agricultural workers, only a Maryland bill and a proposed amendment to the present California minimum-wage law for women have departed from the three standard draft bills by including agricultural workers. Eight[18] bills include domestic workers. The New York bill excludes this class of workers from the statutory rates and the overtime regulations of the bill, but provides that a wage board may be appointed to recommend appropriate minimum wages and maximum hours for domestic workers. All but three (one in Arizona and two in California) of the remaining bills exempt such employees from the hour provisions altogether or permit 60 hours of work before the overtime rates must be paid.

The great majority of the wage and hour bills introduced in legislatures in the past winter confined exemptions to those classes of employees suggested in the committee's bill, namely, executives, professional workers, and persons employed in agriculture and domestic service in private homes. One wonders, however, if this would have continued to be the case if more legislatures had given these bills more serious consideration. Comparatively few bills reached the stage of debate on the floor of either house of the legislature, and even fewer demanded sufficient attention to lead to substantial amendment. An analysis of the amendments made to a few of the bills, however, throws some light on the kind of exemptions that might have been demanded if more bills had been seriously considered for passage. One example is that of a bill that was amended to exclude any employee covered by the Federal Fair Labor Standards Act. Amendments excluding employers of less than a certain number of employees were made in two cases. The exemption of outside salesmen,

[18] Arizona, California (2 bills), Maryland, Massachusetts, Michigan, New York, and West Virginia.

of employees covered by certain provisions of the Interstate Commerce Act and Railway Labor Act, workers engaged in the processing of certain agricultural products, and employees of small newspapers are types of amendments obviously suggested by the provisions of the Fair Labor Standards Act. Exemptions of this kind are much more likely to be sought under statutes in which specific rates are set than under laws that establish minimum wages only through the wage-board procedure. An examination of state minimum-wage laws of the latter type will reveal that few workers are exempted except domestic workers and laborers on the farm.

An amendment was suggested to the authors of wage and hour bills introduced in states already having minimum-wage laws for women by the Women's Bureau of the U. S. Department of Labor and by others interested in securing and maintaining living wages for working women. The purpose of this amendment was to guarantee the nonrepeal of existing minimum-wage laws for women and the validity of wage orders issued under them. The reason for concern about this matter was that the courts have not yet ruled on the constitutionality of the Federal Fair Labor Standards Act and other laws modeled after it; in fact, the United States Supreme Court has not ruled on the constitutionality of any type of minimum-wage legislation for men. Persons interested in the welfare of women were not willing to see laws that had been upheld by the Supreme Court replaced by others on which there had as yet been no ruling. The hope was that until the courts had ruled on the new type of legislation, the two laws could stand on the statute books together.

The introduction of these 42 State wage and hour bills in the legislatures of 29 states doubtless has had important educational results. The public knows much more about this type of legislation than it would have known if these bills had not been introduced. But so far as additions to state labor legislation of wage and hour laws of the type discussed in this paper are concerned, the net result of this year's legislative sessions is exactly zero. Only one bill has been approved by even one house of any state legislature. That is the New Jersey bill which was passed by the Assembly June 21, 1939. Thirty have died either through adjournment or by action taken by the legislature before adjournment. One has been killed by a legislature that is still in session. There is a possibility that some bills may yet be passed by the seven legislatures still in session in which bills have been introduced but have not yet been acted on. However, the time is getting short, and the prospects of an abundant harvest of State fair labor standards acts is gradually waning.

It is interesting to speculate on the reasons for the failure of any of these bills to pass. The comment most frequently heard in legislative chambers is "We want to give the Federal law a chance to work. If its operation is successful during the next two years, we will then be ready to consider a State bill." Some less well informed legislators seem to be under the impression that the existence of the Federal Act removes the necessity for state legislation. Any kind of labor legislation is difficult to secure without strong labor support. Wage and hour legislation, if passed, would benefit most the unorganized workers. This group is likely to comprise our least

articulate citizens and cannot be depended on to press for any kind of legislation. The American Federation of Labor has never really accepted the philosophy of minimum-wage legislation. Its opinion has not changed though it adopted an official State wage and hour bill. In most states where this bill has been introduced the organization has done little to influence its passage; in fact, some State Federations of Labor have recommended the postponement of passage until an opportunity for further study may be had. The Congress of Industrial Organizations seems to be genuinely in favor of this type of state legislation, but in most states its influence with the legislators has not been sufficient to secure the passage of these bills.

It may be true, as some state legislators have remarked, that two years' experience under the Federal Fair Labor Standards Act may suggest many practical changes that should be made in the State draft. By the end of the next two years the courts may have placed their stamp of approval on this new type of legislation, thus removing the uncertainty concerning its constitutionality that has been one argument against immediate passage. The conservative complexion of this year's state legislatures may be considerably modified before the 1941 sessions. Or events beyond the control of either state or federal legislature may remove such questions temporarily from the public interest. However that may be, today in the United States of America there is no State fair labor standards law modeled after the Federal Fair Labor Standards Act of 1938.

LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS ACT

JOHN S. FORSYTHE*

I

The roots of the Federal Fair Labor Standards Act of 1938 are deep in a movement that extends back over a period of years,[1] yet it is evident that the closest relationship exists with the wage and hour standards established under the National Industrial Recovery Act. When the N.I.R.A. was invalidated by the Supreme Court the subject of federal betterment of wages and hours was not allowed to become quiescent. President Roosevelt is said to have insisted on the labor standards in the 1933 legislation and, after the *Schechter* case, to have repeatedly deplored their abandonment.[2] A chance for a bold declaration came in 1936 when the Supreme Court reiterated its stand that wage and hour control was beyond the sphere of state, as well as federal, activity.[3] This decision paved the way for the plank in the Democratic Party platform of the same year urging national action, by constitutional amendment if need be, to eliminate substandard working conditions and child labor. After the Democratic victory at the polls in November, there is evidence that the manner of carrying out this pledge was receiving much attention from the Administration[4] and members of Congress.

The intensity of speculation in this regard increased when the 75th Congress met in January, 1937. Some felt that the drafting of a constitutional amendment was the only method by which the party pledge might be carried out, but in his message to Congress on January 6, the President stated his general opposition to immediate amendment of the Constitution, and asked instead for an "enlightened view" on social legislation from the judiciary in order that democracy might be made to function successfully. Reports of the President's first press conference of the year indicate that plans were being formulated to "do something" about minimum wages as well as judicial opposition to his program.[5] The coincidence of his statements on these two matters was not properly interpreted in the press at the time, but it serves to illustrate the significant fact, namely, the close tie beween federal labor standards

* Member of the graduating class, 1939, Duke University School of law.

[1] See de Vyver, *Regulation of Wages and Hours Prior to 1938, supra,* p. 323.

[2] N. Y. Times, Jan. 10, IV, p. 6, col. 3.

[3] Morehead v. People *ex rel.* Tipaldo, 298 U. S. 587.

[4] N. Y. Times, Jan. 4, 1937, p. 18, col. 4.

[5] TIME, Jan. 11, 1937, p. 13.

legislation and the President's plan for "reorganization" of the Supreme Court. It was to become clear during the first session of the 75th Congress that each of these plans was being used in the attempt to bring the other into being.

The month of January, 1937, was a period of intense activity behind the scenes so far as wage and hour legislation was concerned. Numerous drafts were being prepared by Administration advisers, Labor Department officials, and even by persons having no public responsibility. General Johnson, of NRA fame, favored a bill making use of the taxing power, while Donald Richberg, his successor, wished to amend the Anti-Trust Laws so as to accomplish the desired end, and make the work under substandard labor conditions an unfair method of competition subject to the jurisdiction of the Federal Trade Commission.[6]

President Roosevelt began his second term of office with conferences with Senator Black of Alabama, chairman of the Senate Committee on Labor, and with Representative Connery of Massachusetts, who held the similar chairmanship in the House. Rumors flew thick and fast as to what was in prospect and, in spite of assurances to the contrary by the President, many felt that a "new NRA" was being prepared which would cover a broad field of trade practices. Then on February 5, 1937, President Roosevelt announced his plan for reorganizing the federal judiciary. It was instantly recognized that here was his answer to the problem of getting social legislation held valid. In fact it was announced that a wage and hour bill and other legislation would follow in the wake of the passage of the Court Plan.[7] The need for control over hours and wages was evidently considered by the President to be one of the strongest weapons available to force passage of the Court Bill. For this reason it was indicated that the legislation would not be submitted until after there had been action on the Court Plan.[8]

Momentous decisions were being announced by the Supreme Court during this period which were to vitally affect both labor standards legislation and the Court Bill. The Supreme Court reversed its stand on minimum wage legislation[9] and upheld the Railway Labor Act[10] and the National Labor Relations Act.[11] These decisions served to take considerable pressure off of the drive to enact the Court Bill, and as the session wore on without any action on this proposed legislation, the Administration decided to go ahead with the introduction of a wage and hour bill. The provisions of the proposal became known several days before the President's speech on May 24, 1937, calling for its enactment, but the bills introduced into the two houses of Congress by Senator Black and Representative Connery, respectively, deviated from those originally announced in that the basic wage and hour standards were left blank instead of being 40 cents an hour and 40 hours weekly.

The President's message[12] to Congress asserted the necessity for governmental

[6] N. Y. Times, Feb. 3, 1937, p. 10, col. 3.
[7] *Id.* Feb. 8, 1937, p. 1, col. 8.
[8] *Id.*, April 27, p. 1, col. 6.
[9] West Coast Hotel Co. v. Parrish, 300 U. S. 379.
[10] Virginian Ry. v. System Federation No. 40, 300 U. S. 515.
[11] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1.
[12] SEN. REP. 884, 75th Cong. 1st Sess. (1937) 1.

control over maximum hours, minimum wages, the evil of child labor and the exploitation of unorganized labor. He stressed the constitutional basis for such legislation in the power of Congress over the channels of commerce and the desirability of barring goods produced under "unfair" standards from these channels. It is interesting to note that the President did not envisage a uniform raising of standards in all industries and for all regions. He stated that as a practical matter there should be "some differentiation between different industries and localities."

Original Bill. On the same day that the President sent his special message to Congress nearly identical[13] bills, S. 2475 and H. R. 7200, were introduced by Senator Black and Representative Connery. It was to be exactly 13 months and one day from this date before the measure reached the President's desk for signature and only then after having undergone amendment after amendment until practically the only point in common with the original bill was the legislative number. The original bills proposed the creation of a Fair Labor Standards Board of five members to administer the Act and keep goods produced under substandard labor conditions from entering interstate commerce and those conditions themselves from "affecting commerce." Congress was to set statutory minimum wages and maximum hours but the Board would have power to raise or lower these standards.[14] It is important to note that the purpose of the drafters was not to provide a sudden straight-jacket of wages and hours for all industry. Extreme flexibility was the keynote of this draft. The wages and hours provisions were only to become operative when the Board so ordered, and then only to the specific industries covered by the order.[15] In addition to these barely non-oppressive wage and hour standards the Board had authority to fix a minimum "fair" wage and a maximum "reasonable" workweek.[16] Certain statutory objectives were set forth to be used as guides in arriving at those higher standards. However, the Board was restricted to the extent that it could not establish minimum wages of more than $1200 a year or 80 cents per hour except for overtime, night and extra-shift work. The Board was authorized, if its members so wished, to appoint advisory committees in the various industries.[17]

Child labor under the age of 16 was prohibited, with power in the Chief of the Children's Bureau to bar the labor of those under 18 in any occupation which he thought "particularly hazardous" or detrimental to their health or well-being.[18] The child labor provisions were substantially patterned after the Federal Child Labor Law

[13] There were two minor points of difference. *Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 2700*, 75th Cong. 1st Sess. (1937) 44. Hereinafter cited as *Hearings*.

[14] Original Bill, §4(c). For an explanation of the terminology used in referring to the several bills, see Table of Bills, *infra*, p. 475.

[15] Assistant Attorney General Robert H. Jackson said in this connection: "Portions of the bill relating to wages and hours would become operative as and when the Board created by the act orders their application. This bill does not plunge the nation headlong into rigid and widespread policy of regulating wages and hours. It permits the building up a body of experience and prevents extension of regulation faster than capacity properly to administer is acquired. The investigations of the Board will also provide the evidence and the findings upon which the Government can rest its argument if the constitutionality of the act is assailed." *Hearings*, p. 4.

[16] Original Bill, §5.

[17] Original Bill, §14.

[18] Original Bill, §2(a) (13).

declared unconstitutional in *Hammer v. Dagenhart*.[19] The use of strikebreakers and labor spies was included in the oppressive labor practices forbidden in this draft.[20]

Hearings. Joint hearings on the proposed legislation were held by the House Committee on Labor and the Senate Committee on Education and Labor from June 2 to June 22, 1937. More than twelve hundred pages of testimony was taken from labor leaders, industrialists, trade association representatives, and others. During the hearings on June 15, 1937, William P. Connery, chairman of the House Labor Committee, died, and the leadership for the coming battle in the House passed to Mrs. Mary T. Norton, of New Jersey.

The opening statement at the hearings was made by Assistant Attorney General Robert H. Jackson, who explained the bill section by section and demonstrated the constitutional bases upon which the various sections would be supported.[21] He likewise took great pains in demonstrating the bill was not "another NRA." John L. Lewis, representing the CIO and the United Mine Workers of America, testified that he was generally in favor of the bill.[22] He suggested that Congress should set a maximum of 35 hours per week and give the Board power to vary the figure up to 40 or down to 30 as the situation required. Strangely enough, Lewis, and not President Green, of the AFL, was strongly opposed to giving the Board discretionary power to raise wages above 40 cents an hour. He urged the abolition of Section 5 and all other sections pertaining thereto. His reason for so objecting seemed to be the fear that such minimum "fair" wages and maximum "reasonable" hours if fixed by the Board would tend to become actually the maximum wage and the minimum hours. It also seems clear that he felt that it would put a powerful propaganda weapon in the hands of employers if unions saw fit to strike for standards higher than had been set by the Board as "fair" and "reasonable."[23]

William Green, president of the American Federation of Labor, announced that his organization, by action of the executive council, endorsed the proposed Fair Labor

[19] 247 U. S. 251 (1918).

[20] Original Bill, §2(a) (12). This provision was omitted by the Senate Committee on Education and Labor and never revived in subsequent drafts. The committee felt that such matters could best be handled by Amendment of the National Labor Relations Act. SEN. REP. No. 884, 75th Cong., 1st Sess. (1937) 5.

[21] The several prohibitions of the bill probably incorporate more constitutional theories than any other piece of suggested legislation in the history of the country. The idea was, as Mr. Jackson indicated, to consolidate all hopeful approaches to constitutionality. He stated: "This act combines everything, and is an effort to take advantage of whatever theories may prevail on the Court at the time that the case is heard. Of course, that results in a good deal of complication." *Hearings*, p. 54.

The opinions upon which it was stated that the several sections in the original S. 2475 were based are: §7(a) (dissenting opinion by Mr. Justice Holmes in Hammer v. Dagenhart, 247 U. S. 251 (1918)); §7(b) (Kentucky Whip & Collar Co. v. Illinois Central R. R., 299 U. S. 334 (1937)); §7(c) (Wilson v. New, 243 U. S. 332 (1917) and Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 (1925)); §8(a) (*Shreveport Rate Case*, Houston, E. & W. Texas R. R. v. United States, 234 U. S. 342 (1914)); §8(b) (Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456 (1924)); §9(a) (Federal Trade Commission v. Keppel and Bros., 291 U. S. 304 (1934)); §9(b) (Stafford v. Wallace, 258 U. S. 495 (1927)); §10(1) (National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937)); §10(2) (Stafford v. Wallace, 258 U. S. 495 (1937)); §10(3) (Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 (1925)); §22(b) Whitfield v. Ohio, 297 U. S. 431 (1936)). *Hearings*, pp. 58-62.

[22] *Hearings*, p. 271.

[23] *Id.*, pp. 279, 285-286.

Standards Act of 1937 but wished to offer several perfecting amendments.[24] These amendments were mainly to strengthen the administrative portions of the act and further protect collective bargaining agreements.[25] Green stated that the AFL wanted no overlapping between collective bargaining activity and governmental control of wages and hours; that he understood the legislation was merely an attempt to encourage collective bargaining and as collective bargaining expanded, government control should abandon the field. Mr. Green would carry this theory to the extent of refusing to let the Board raise standards reached through collective bargaining even if they were below the minimum standards set by Congress.[26] Green recommended a basic 40-hour week with Board having power to vary it down to 30 hours. He also recommended a basic 40 cent minimum, but unlike Lewis he favored leaving the power in the Board to raise wages up to 80 cents per hour.[27] Green also expressly favored a Board of five to administer the act. This is interesting in view of his later position concerning the administrative features.[28]

Sidney Hillman, president of Amalgamated Clothing Workers of America, a CIO union, took an opposite position to Mr. Lewis on the question of whether or not under Section 5 the Board should have power to set up "fair" wages and "reasonable" hours higher than the basic standards set by Congress.[29] He wanted the Board to have this discretion. He explained this difference partly on the ground that Mr. Lewis's experience had been with an industry which bargained on a national scale, while his own was in industries such as textiles, garments, and shoes, where collective bargaining cannot cover the whole industry, and the only way to raise standards uniformly is to have it done by the government. Forcing high standards on a few employers at a time would drive those out of business before the rest of the industry could be effectively organized.[30]

Appearing against the bill, George H. Davis, president of the Chamber of Commerce of the United States, criticized it mainly for the uncertainty in future labor costs which it would cause.[31] Mr. James A. Emery, General Counsel of the National Association of Manufacturers, argued that the bill used an unconstitutional view of the commerce power, and was also an invalid delegation of power.[32] Mr. Noel Sargent, economist for the same organization, also appeared in opposition to the bill. His most important arguments were that it would raise the cost of living for the farmer, that it would be impossible to administer such a complicated and cumbersome bill in a satisfactory manner, and that it would be an unfair burden on the manufacturer who has foreign competition either here or abroad.[33] Others appearing against the bill were Guy L. Harrington, National Publishers Association; Arthur Besse, Pres-

[24] *Id.*, p. 211. The Executive Council of the AFL had been in session when the bills were first introduced and Green had announced that the organization might oppose a wages and hours bill because there was "strong feeling on the part of some against minimum wages for men." N. Y. Times, May 24, 1937, p. 1, col. 2.

[25] *Hearings*, pp. 221-222.

[26] *Id.*, p. 226; *cf. id.*, p. 227.

[27] *Id.*, pp. 220-221.

[28] See note 46, *infra*.

[29] *Hearings*, pp. 945-946.

[30] *Id.*, p. 498.

[31] *Id.*, pp. 935-943.

[32] *Id.*, pp. 623-645.

[33] *Id.*, pp. 645-664.

ident of the National Association of Wood Manufacturers; Samuel Fraser, Assistant Secretary of the International Apple Association; Claudius Murchison, President of the Cotton Textile Institute; John B. Scott, Anthracite Institute; and Benjamin C. Marsh, Executive Secretary of the People's Lobby.

S. 2475 in the Senate. On July 8, 1937, Senator Black, for the Senate Committee on Education and Labor, favorably reported the Fair Labor Standards Act with amendments. In one sense the Senate Committee Bill was even more flexible than the Original Draft, in others not so flexible. No statutory minimum wages or maximum hours were set up. Instead the Board was given power to set these standards.[34] However, the range of this power had been greatly curtailed from that in the original bill for the minimum wage could not exceed 40 cents an hour and the maximum hours could not be under 40 hours a week. Advisory committees were made mandatory.[35] The child labor standards were lowered so that children under 16 could be employed in occupations which the Chief of the Children's Bureau found would not interfere with their schooling or be detrimental to their health. Finally a provision was added to quiet the opposition which had developed around the fear that higher wages and lower hours would mean higher production costs which in turn would mean an influx of cheap foreign goods.[36] This provision gave the Tariff Commission the power to investigate to see if higher tariff rates would be necessary because of increased costs of production.[37]

The bill as reported by the Senate Committee did not reach the floor of the Senate for debate until July 26. There were no particular developments of importance in the debate aside from the open split that developed in the AFL ranks between President Green and certain of the department heads. A move to recommit the bill was given impetus by the fact that the AFL was said to be opposed to the form the bill had taken. Mr. Green denied that the AFL favored recommitment. He stated that the bill did not meet labor's expectations, but that it seemed advisable to pass it in its present form with the hope that satisfactory amendment could be effected in the House. At the same time that this announcement was read to the Senate a statement was also read urging recommittal of the bill because of alleged interference with the operation of the Walsh-Healey Act. This latter statement was signed by John P. Frey and J. W. Williams, heads of the metal and building trades departments in the AFL.[38] A number of Southern senators attacked the bill, but the statement attracting the most attention was that of Senator E. D. Smith of South Carolina to the effect that it only took 50 cents a day to live reasonably and comfortably in his state.[39]

The Bill passed the Senate on July 31, 1937, by a vote of 52 to 28. The only outstanding change made on the floor of the Senate was the substitution of the so-called Wheeler-Johnson child labor amendment in place of all the child labor provisions of

[34] Senate Committee Bill, §4(b) and (c).
[35] *Id.*, § 11.
[36] See *Hearings*, pp. 75-76.
[37] Senate Committee Bill, §8(c) and (d).
[38] N. Y. Times, July 30, 1937, p. 1, col. 6; *id.*, July 31, p. 4, col. 2. See also 81 CONG. REC. 8192 (1937).
[39] N. Y. Times, July 31, 1937, p. 1, col. 4.

the Senate Committee Bill.[40] This amendment was based on the convict-made goods formula, whereby a state may exclude goods produced under standards lower than those prevailing within the state, which had been severely criticized at the hearings.[41] It may be that one reason for the relatively easy passage in the Senate was that the opponents of the bill, or of specific provisions of the bill, as in the case of the AFL, had decided it would be better strategy to wait and fight the issues out in the House. The possibility of early adjournment would add to the value of this technique.

First House Committee Bill. Although the prolonged battle over the Court Plan had added to the usual Congressional urge to leave Washington in mid-summer, a group of some thirty members of the House had pledged themselves to fight adjournment until the wage and hour hill was enacted.[42] On August 6, 1937, the Senate bill with amendments of the House Committee on Labor was reported out favorably. The most important change was to replace the Wheeler-Johnson child labor amendment with the child labor provisions in the Senate Committee Bill.[43] The demands of the AFL for protection of collective bargaining agreements were met to the extent of providing that the Board should not have jurisdiction of wages and hours in occupations where collective bargaining facilities were adequate. It would seem that the bill would have passed the House if it could have been brought to a vote at that time, but the Rules Committee, by a combination of Republicans and Southern Democrats, refused to issue a rule to let the House consider the measure. An attempt was made to get action by calling a Democratic caucus but when it met on August 19, 1937, no business could be transacted because a quorum would not answer to their names, and this spelled the doom of the legislation at this session.[44]

Special Session. President Roosevelt issued a call for a special session to convene on November 15, 1937. On October 12, he made a radio address in which he declared that wage and hour legislation would be one of the matters considered at the special session; and in a special message to Congress on November 15, 1937, he pointed out the need for federal wage and hour legislation.[45]

When the session convened, however, it immediately became apparent that the members of the Rules Committee had not changed their views on the subject and that they would refuse to issue a rule to let the House consider the bill. On November 16, 1937, Mrs. Norton started a petition to discharge the Rules Committee from further consideration of the matter. At first it did not appear that sufficient names would be secured. For one thing during the summer, more opposition had developed in the ranks of the AFL and President Green had been instructed to consult with

[40] Senate Bill, §24. This provision had been reported favorably as a separate bill by the Senate Interstate Commerce Committee. N. Y. Times, June 8, 1937, p. 9, col. 3.

[41] See p. 489, *infra*, for explanation of the theory of this provision.

[42] N. Y. Times, July 31, 1937, p. 1, col. 4.

[43] H. R. REP., No. 1452, 75th Cong., 1st Sess. (1937) 9.

[44] This can probably be explained by the fact that many members were not in favor of the legislation at that time for one reason or another and did not want it to be brought from committee, though they would have felt compelled to vote for it if it had been brought to the floor where a vote could have been forced. See 82 CONG. REC. 197 (1937).

[45] N. Y. Times, Dec. 1, p. 22, col. 5.

the heads of the various departments of the Federation before issuing any more statements about the wages and hours legislation. The AFL opposition now centered on granting discretionary powers to an administrative board.[46]

In an attempt to meet this AFL opposition the House Labor Committee proposed an amendment placing the administration of the act in a newly created wages and hours division of the Department of Labor with an administrator appointed by the President. This second House Committee Bill differed greatly from former bills. Instead of having a Board initiate moves to set minimum wages and maximum hours with the aid of an advisory committee, the new draft provided that the power should be shifted to wage and hour committees[47] to be appointed by the administrator. The committee recommendations were binding on the administrator if supported by evidence and based on certain enumerated guides in the statute. Although the House Labor Committee wished to make these numerous amendments to the Bill held by the Rules Committee, it still did not appear that the chance to make amendments of any sort would be given. Some of the group, who had in the previous session tried to prevent adjournment before action on the Bill, now determined to make use of the practical political expedient of trading votes. The strategy was to block the farm program until the Rules Committee relaxed its stranglehold. This tie-up with the vote on the farm bill, in the drive to secure names on the petition, was apparently successful. Representative Jones of Texas, sponsor of the farm legislation, was induced to sign, and sufficient signatures were secured by December 2 to discharge the Rules Committee. Representative Fish of New York proffered a resolution that an investigation be made of the Administration lobbying during this period but it did not receive serious attention.[48]

When it became evident that the House would vote on the Bill the AFL was not satisfied with the changes suggested by the House Labor Committee. A bill drafted at the convention in Denver was brought forward and offered as a substitute bill under the sponsorship of Congressmen Dockweiler and Griswold.[49] It provided for rigid 40 cent minimum and 40 hour maximum, with an 8-hour day. Since no discretion was necessary to administer these provisions the only enforcement was through the Attorney General. Criminal proceedings were to be brought by the various Federal District Attorneys. After this was defeated by 162 to 131, the AFL threw its weight to have the bill recommitted, which was done on December 17, 1937, by a vote of 216 to 198.[50]

The combination of conservative Southern Democrats with Republicans and AFL followers explains the vote, although it came as considerable of a surprise after enough names were secured to get the Bill on the floor. Alsop and Kintner in a syndicated column state that the shift of the vote in the Louisiana and New

[46] This is traceable to the attitude taken by the AFL leaders toward the National Labor Relations Board. There had been no previous objection on this point, in fact a board had been specifically approved. See note 27 *supra*.

[47] Second House Committee Bill, §4.

[48] N. Y. Times, Nov. 30, 1937, p. 9, col. 1; *id.*, Dec. 3, 1937, p. 1, col. 8.

[49] 82 CONG. REC. 1591 (1937).

[50] *Id.*, p. 1835.

Jersey delegations was crucial and explain the shift on the basis of the ruffled feelings of New Orleans' Mayor Maestri and the desire of Jersey City's Mayor Hague to take a slap at John L. Lewis.[51] The same dispatch indicates, however, that Lewis did not have a lobby actively working against recommittal.[52]

Third Session of the 75th Congress. Although the wage and hour bill was quite definitely on the agenda for the Third Session of the 75th Congress, it received very little attention during the early months of that session. Due notice was taken of the defeat of Heflin in the Alabama senatorial election by Lister Hill who, while in the House, had voted for the wage and hour bill. Still, subsequent to this came the defeat of the President's Reorganization Bill by the House and this was widely held to be a personal rebuke to the President and to the New Deal program in general.[53] In the light of this it seems quite unlikely that any legislation of the type of the wage and hour bill would have been enacted at that session if it had not been for Senator Pepper's victory in the Florida Democratic Primary. The House Labor Committee had already reported out a new bill but it was resting in its usual pigeon-hole in the Rules Committee. Senator Pepper's victory, after a campaign in which the Bill had been an issue, served to open the floodgates, and when the petition to discharge the Rules Committee was opened for signature the required number of names were secured in two hours and 20 minutes. The favorable poll of the Institute of Public Opinion undoubtedly had its effect also.[54]

The Third Session Bill took a still different approach to the problem of flexibility of standards. This time the administration of the act was to be placed in the Secretary of Labor.[55] His main duty was to decide if a given industry was in interstate commerce (under standards set up by the statute). If he so found, the wages and hours provisions became automatic and were applicable. No regional differentials were provided. The standards this time were on a scale basis which changed from year to year.[56] Of course with the rigid standards there was no need of any advisory committees. This bill without substantial amendment was passed by the House on May 24, 314 to 97.

Before this Third House Committee Bill was introduced Mrs. Norton had appointed a subcommittee of the House Labor Committee under the chairmanship of Representative Ramspeck of Georgia to make a report. Mr. Ramspeck's report, however, was not accepted by the committee. He therefore submitted it to the House as a minority report and asked that it be an amendment. His bill contained some of the provisions of the older bills: A five-man board to administer the act with power to fix minimum wages and maximum hours within the old 40-40 limit. One new thing added was a provision to keep the board from raising the pay more than five cents in any one 12-months period. This was defeated on May 24 by a vote of 139 to 70.

Conference Report and Final Enactment. It was necessary now that a conference committee attempt to iron out the differences between the drafts passed by the House

[51] N. Y. Times, Dec. 22, 1937, p. 20, col. 4.
[52] *Ibid.*
[53] TIME, April 18, 1938, p. 16.
[54] See 83 CONG. REC. 7282 (1938).
[55] Third House Committee Bill, §6.
[56] *Id.*, §§4 and 5.

and the Senate. There were rumblings from certain Southern Senators of a filibuster unless the differential, omitted in the Bill passed by the house, be restored. This question of regional differential seems to have been all-important during the period that the conference committee was at work. It is interesting to note that Administrator Andrews, then New York Industrial Commissioner, stated his opposition to a statutory regional differential in a radio address delivered at this time.[57]

The deadlock in the conference was holding up adjournment and it was freely predicted that once again the wage and hour legislation would fail. Senators Ellender and Pepper, members of the conference, at first refused to accede to a statutory wage ever going above 30 cents an hour.[58] But compromises as to flexibility in attaining minima and the inclusion of a provision which could be construed to allow regional differentials (although expressly disclaiming it) paved the way to agreement in the conference on a completely rewritten bill. This was adopted by the House on June 13 and by the Senate on June 14 with comparatively little debate. The bill received the President's approval on June 25, 1938.

Provisions of the Act. The Act as signed by the President sets up a rigid scale of wages and hours for workers in interstate commerce or who produce goods for such commerce. A statutory minimum of 25 cents is in effect the first year, then a 30-cent minimum is the standard until October, 1945, when the 40-cent wage becomes operative. (Section 6). Unless there is payment of one and one-half times the regular rate of pay covered employees may not be worked in excess of 44 hours the first year, 42 hours the second and 40 after the second. (Section 7). The enforcement of the Act is under the control of a single Administrator in the Department of Labor. Industry committees, appointed by him, may make recommendations which can be made the basis of a wage order setting a minimum wage in excess of the universal rate but not more than 40 cents an hour. (Section 8). There are numerous exemptions, some outright, some dependent upon administrative regulation. There may be criminal and injunction proceedings against violators and civil recovery of double damages by workers. (Section 16). Child labor under 16 years of age is prohibited except under certain conditions laid down by the Chief of the Children's Bureau, and may even be eliminated in certain occupations up to 18 years of age (Sections 3(1) and 12).

This article is divided into two main sections. The first has outlined the broad general legislative history from the introduction of the bill until its signature by the President. This second section attempts to pick out particular features and follow them through the maze of proposals which make up the very complicated legislative history of this particular act. The second section is itself divided into a number of parts selected arbitrarily to bring out the most important provisions as they were developed.

[57] N. Y. Times, May 31, 1938, p. 29, col. 4.
[58] N. Y. Times, June 9, 1938, p. 1, col. 1; *id.*, June 10, 1938, p. 1, col. 8.

In all, ten different bills reached the floor of Congress, all with at least a major change from its predecessor and most of them in the form of amendments substituting an entirely different proposal. Even the structure of the bills was completely changed. The original bill contained five main parts with 30 subsections. The final draft was in a completely different form with 19 sections in no way comparable to the original sections. Of necessity there has been a limitation of the discussion to these ten proposals. There is evidence that many more drafts were written which never got to the floor.[59]

For the sake of convenience the bills are summarized here. The terminology indicated is used throughout the article.

1. *Original Bill.* Introduced May 24, 1937, in the first session of the 75th Congress. In the Senate it was S. 2475; in the House H. R. 7200.

2. *Senate Committee Bill.* Introduced into the Senate July 8, 1937, S. 2475, 75th Congress, first Session, Calendar No. 905.

3. *Senate Bill.* Passed by the Senate July 31, 1937, and sent to the House of Representatives, 75th Congress, first session.

4. *First House Committee Bill.* Senate Bill with amendments added by the House Committee on Labor. Introduced into the House August 6, 1937. S. 2475, 75th Congress, first session, Union Calendar No. 535. This bill did not reach the House floor before the session ended.

5. *Second House Committee Bill.* Introduced into the House as amendment to the First House Committee Bill December 14, 1937, during the special session. 75th Congress, second session. It was recommitted to the House Labor Committee December 17, 1937.

6. *AFL Bill.* This amendment was sponsored by the American Federation of Labor as a substitute for the Second House Committee Bill. It was introduced on December 15, 1937 by Representative Griswold and defeated December 16, 1937, 75th Congress, second session.

7. *Third House Committee Bill.* This was introduced into the House on April 21, 1938. S. 2475, 75th Congress, third session. Union Calendar No. 804.

8. *Ramspeck Bill.* This is a minority bill from the House Labor Committee. Introduced May 4, 1938. 75th Congress, third session. This bill had been introduced in the same session of Congress under a different number, H. R. 10538, 75th Congress, third session. It was defeated May 24, 1938.

9. *House Bill.* This is the third house committee bill with amendments added from the floor of the House. Passed by the House May 24, 1938. 75th Congress, third session.

10. *Act.* This is the bill rewritten in the conference. Pub. L. No. 718, 75th Congress, third session (June 25, 1938). 52 STAT. 1060, 29 U. S. C. §§201-219 (Supp. 1938).

Although this was one of the most bitterly fought pieces of legislation ever to be enacted by Congress, with the true issues frequently clouded by storms of falsification and propaganda, a calm analysis reveals that there were really only three main points of contention: flexible against rigid wage and hour standards, single administrator against a board to administer the act, and method to be used to enforce the child labor provisions of the act. The detailed analysis to follow is based on this division.

[59] In looking through the files of the House Labor Committee over 25 separate drafts were discovered which had been considered by the Committee, only four of which ever reached the floor.

II

(A) ADMINISTRATIVE PROVISIONS

In the ten bills which are being discussed in this article there were no less than five different methods of administering the provisions of the acts. The administrative machinery was naturally closely correlated with the wage and hour provisions and the change in one will partially explain the change in the other.

The original bill[60] created an independent agency called the Labor Standards Board with five members for staggered terms of five years at salaries of $10,000 a year. The members were to be appointed by the President with the advice and consent of the Senate and were eligible for reappointment. In making the appointment the President was to consider industrial and geographical conditions.

Before making a wage order in a given occupation the Board could, "if it considered it necessary or appropriate"[61] appoint an advisory committee to investigate and report upon the fair value of services rendered on the number of hours reasonably suitable to the nature of the work involved, or both. The committee was to be made up of an equal number of persons representing employers and employees in the occupation as well as not more than three persons representing the public, the first two groups being selected as nearly as practicable from lists of names submitted by employers and employees in the occupation. If the committee did not report within 60 days a new committee was to be appointed. The Board was to give the committee all available data on the industry involved, and it could accept or reject in whole or in part the committee report, or appoint a new committee. The Senate Committee on Education and Labor made one important change in the advisory committee by making it mandatory on the Board to appoint an advisory committee before a labor standard order could be issued (it had been optional in the original bill). It should be noted, however, that the committee report was not binding on the Board.[62]

The first important change in the manner of selecting the Board came in the First House Committee bill. There an effort was made to give equal representation by providing that the members should be chosen one from the Northeast, one from the Northwest, one from the Southeast, one from the Southwest and one from the Central part of the United States; and further, one of the members was to be a representative of employers and another one to be a representative of employees. To decentralize the administration as much as possible the House Labor Committee provided that the Board should appoint a director for each state, territory, and the District of Columbia.[63]

One of the focal points of attack on the early drafts of the bill was the administrative provisions establishing the independent Labor Standards Board. During the 1st Session of the 75th Congress the opponents of the bill cried "bureaucracy" at every

[60] §3.
[61] Original Bill, §14.
[62] Senate Committee Bill, §11.
[63] First House Committee Bill, §3(a).

opportunity. When, in the interim between the 1st Session and the Special Session[64] the American Federation of Labor joined in this cry the pressure became irresistible and it was apparent that some change would be necessary before enough support could be secured to discharge the Rules Committee.[65] The revision vested the administration of the act in a wage and hour division to be set up in the Department of Labor with an administrator appointed by the President.[66] Although the administrator was in the Department of Labor he was independent in that his orders were not subject to review by any person in the executive branch of the government.

The most important change, however, was the shift in power from the Administrator, the lineal descendant of the Board, to the advisory committees, which were called wage and hour committees,[67] and which were to be appointed by the Administrator in any occupation where he found a substantial number of employees employed at wages and hours inconsistent with the minimum standards of living necessary for health, efficiency, and general well-being. Their duty was to recommend minimum wages and maximum hours for that occupation. Furthermore, the Administrator could set minimum wages and maximum hours only after the committee made their recommendation, having no power to set the standards himself although he could reject the committee recommendation and either send it back or appoint a new committee to consider the problem.

Following the suggestion of the Secretary of Labor,[68] the Administrator and Chief of the Children's Bureau of the Department of Labor[69] were granted power to utilize and pay for the services of state and local officials charged with the administration of state labor laws.[70] This is particularly advantageous in situations where intimate knowledge of local conditions is needed such as for the purpose of issuing certificates for child labor or handicapped labor. At the same time it would tend to strengthen the state labor agencies.

The wage and hour bill which the AFL had introduced at the second session of the 75th Congress contained the simplest administrative provisions of all the proposed bills. Because of the rigid standards there was no administrative machinery. Enforcement of the act was in the hands of the Attorney General who was authorized to petition for injunctions in the district courts to enjoin violations of the act. The various United States district attorneys were to be in charge of any criminal prosecutions.

When the Third House Committee Bill appeared it took a fourth approach to the problem. This time the administration of the act was entrusted to the Secretary of

[64] See p. 470, *supra*.

[65] Mrs. Norton announced on the floor during the Special Session that many members had promised to sign the petition if the administration was taken from a five-man board and therefore the labor committee was prepared to offer an amendment which would place the administration in a division of the Department of Labor under an administrator. 82 CONG. REC. 357 (1937).

[66] Second House Committee Bill, §§3(a), 3(b), and 3(c).

[67] Second House Committee Bill, §4.

[68] *Hearings*, p. 184.

[69] See section on child labor, *infra*, p. 487.

[70] Second House Committee Bill, §3(b); Act, §11(b).

Labor.[71] However, his only important duty was to determine, after a notice and hearing, whether an industry was in interstate commerce. If he found that it was in interstate commerce his duties were practically over for that automatically caused rigid standards of wages and hours to apply.

The Ramspeck amendment at the 3rd session of the 75th Congress was practically the same as the Senate Bill as far as administrative provisions were concerned. He proposed a five-man Board to administer the act with the aid of an advisory committee in setting wages and hours.[72]

The administrative provisions of the bill passed by the house were substantially the same as those in the Third Committee Bill which had been introduced at that session.[73]

The conference report, presenting a fifth method of administration, was a compromise between the theory of the Senate Bill and that in the House Bill. In many ways it was better than either. A wages and hours division in the department of Labor was created under an Administrator appointed by the President, with the advice and consent of the Senate. An industry committee, descendant of the advisory committees and wage and hour committees, must be appointed by the Administrator in each industry engaged in interstate commerce as soon as practicable. These committees may set, within certain limits, wage standards higher than the rigid standards in the act, thus providing some flexibility.

Investigations and Records: Under the original bill the Board was given broad powers of investigation to gather data regarding wages, hours, and other conditions of employment and their effect on interstate commerce to determine whether persons were violating the act, to aid in enforcing the act, or to gather information for the basis of recommendation of further legislation.[74] The usual powers were also granted to subpoena witnesses, take evidence etc. The final Act gave much the same powers to the Administrator, industry committees, and Chief of the Children's Bureau.[75]

Very important to the enforcement machinery of the act are the requirements that employers keep certain records and reports to aid in discovering violations. The original bill required employers subject to the act to make and preserve records prescribed by the Board regulation or order as to conditions and practices of employment and to make a certified copy of the records for the Board whenever requested. Board representatives were to be permitted to examine and copy any books or records pertaining to conditions of employment. Employers subject to a labor standard order were required to keep a copy of the order posted in every room where employees subject to the order were employed.[76] The senate committee bill contained many new regulations as to records, reports, and schedules to be posted in places of employment. Apparently these additions were made at the suggestion of Secretary Perkins who had testified that experience of state labor agencies had found such regulations

[71] §6.
[72] Ramspeck Bill, §§3(a), 3(b), 3(c), and 10.
[73] House Bill, §6.
[74] §15(a).
[75] Act, §§9 and 11(a).
[76] Original Bill, §17(a).

necessary to facilitate enforcement.[77] The Act contains less detailed requirements, being somewhat similar to the original bill.[78]

(B) WAGE AND HOUR STANDARDS

Probably the most bitter fight in the whole wage and hour legislation developed around the issue of flexible against rigid standards.[79] Not only were personal, economic, and social viewpoints involved but difficult constitutional issues were encountered. Those in favor of flexible standards pointed out that rigid standards would run into serious due-process problems; those favoring rigid standards contended the flexible standards involved unconstitutional delegation of powers.[80]

The various wage and hour provisions run the gamut from extreme flexibility in the early bills to extreme rigidity in the AFL and House Bills, with a compromise in the conference of low rigid standards tempered by the possibility of wage variations within definite bounds through the flexible machinery of industry committees.[81]

The original bill proposed a somewhat complicated wage and hour schedule centered around the concepts of "oppressive wage,"[82] "oppressive workweek,"[83] "substandard wage,"[84] and "substandard workweek."[85]

The standards for an oppressive wage and oppressive workweek were to be filled in by Congress. However, even these standards could be varied in either direction by the Board; in case of wages, if necessary "to prevent the depression of general wage levels below those consistent with the maintenance of a minimum standard of living necessary for health and efficiency, without unreasonably curtailing opportunities for employment" or, in case of hours, where the Board found it necessary "considering the physical and economic health, efficiency, and well-being of the employees and the number of persons available for employment, without unreasonably curtailing the earning power of the employees."[86] But these levels were to be barely

[77] *Hearings*, p. 185.

[78] Act, §11(c).

[79] The problem was much more basic than merely a disagreement over flexible or inflexible standards. In the final analysis the argument was one involving different theories of political science. Those in favor of flexible standards believed that the legislation could be best handled by an administrative body of experts who could devote their whole time to the problem. They argued that Congress did not have the time or facilities to intelligently cope with the situation. On the other hand the persons favoring rigid standards argued that Congress could, and should, set standards which would be fair and just to all concerned. The same problem is at the heart of all government through administrative agencies.

[80] Robert H. Jackson pointed out that wage and hour legislation inherently involves these two constitutional problems and of necessity standards must not be set so rigidly that an extremely harsh case can be brought up under the due process clause, while on the other hand flexible standards must have enough legislative guides to stand up under a delegation of powers argument. *Hearings*, p. 19.

[81] In the discussion of the wage and hour provisions the reader should note that an "order" can only be given after a hearing, while a "regulation" may be issued at the discretion of the administrative agency.

[82] *Oppressive wage* was a wage lower than.....cents per hour unless another minimum wage standard was established by regulation or order of the Board. Original Bill, §2(a)(10).

[83] *Oppressive workweek* was a workweek longer than.....hours per week unless another standard was established by regulation or order of the Board. Original Bill, §2(a)(11).

[84] *Substandard* wage was a wage lower than a minimum fair wage established by an order of the Board. Original Bill, §2(a)(16).

[85] *Substandard workweek* was a workweek longer than a maximum reasonable workweek established by an order of the Board. Original Bill, §2(a)(17).

[86] Original Bill, §§4(c) and 4(d).

nonoppressive, and the Board had authority to set higher standards under Section 5 of the original bill.

When the Board became convinced that "owing to the inadequacy or ineffectiveness of the facilities for collective bargaining, wages lower than a minimum fair wage are paid to employees in any occupation" subject to the act, it could conduct an investigation of the wages paid in such occupation and the value of the services rendered therefor. If the Board found that wages lower than a minimum fair wage were being paid in a substantial part of the occupation and that the establishment of a minimum fair wage would not unreasonably curtail opportunities for employment, the Board could make an order setting a minimum fair wage in that occupation. In determining the minimum fair wage the Board was to consider: (1) the cost of living and all other relevant circumstances affecting the value of the service rendered, (2) such things as would guide a court in a suit for reasonable value of services rendered without a contract as to the amount of the wage to be paid, (3) the wages established for work of comparable character by bona fide collective labor agreements, and (4) wages paid for comparable work by employers who voluntarily maintain fair wage standards in the occupation.

Likewise, under the same conditions, the Board could fix a maximum reasonable workweek where it would not unreasonably curtail the earning power of the employees. In arriving at the maximum reasonable workweek the Board was to consider: (1) the relation of the work to the physical and economic health, efficiency, and well-being of the employees and other relevant circumstances affecting the reasonableness of the period of working time for the work performed; (2) the number of persons available for employment in the occupation to be subject to the workweek order, and also factors (3) and (4) set out to be considered in connection with minimum fair wages.[87] However, the Board could not set an hourly wage of over eighty cents except for overtime, night, or extra shift work, or one which would yield an annual income of more than $1,200; nor could it set a workweek of less than..... hours.

It is not until one examines the broad powers granted to the Board through its authority to issue labor standard orders that the extreme flexibility of this original bill is fully realized.[88] Each order, which could only be made after notice and hearing to interested parties, had to state the provision or provisions of the act on which it was based, and to define the occupation, the territorial limits thereof, and the class, craft, or industrial unit to which it related. In issuing the order the Board could classify employers, employees, and employments within the occupation according to

[87] The original bill recognized that differentials could be established but it was not the expectation that they should arise merely because of geographical location of a particular industry. Jackson explained that, "The differential which the Board would embody in an order is not a differential which the Board established; it is the differential which already exists, but which it recognized, because the Board is required to find the value of the services at the point which is under consideration. . . . The Board is authorized to recognize in each community the factors in its life which produce a differential, and to fix that differential into its minimum as collective bargaining will be expected to fix it in its maximum." *Hearings*, p. 40.

[88] Original Bill, §12.

localities, population of communities, number of employees, nature and volume of goods produced, and other differentiating circumstances necessary to carry out the act, and to make appropriate provision for different classes of employers, employees, or employment. But it was declared to be the policy of the Board to avoid unnecessary classification. In the case of an order relating to wages, the Board had authority to include such terms and conditions as it considered necessary or appropriate to prevent the established minimum wage becoming the maximum wage and to prevent the discharge or reduction in wages of employees receiving more than the established minimum wage.[89]

The bill as it appeared from the Senate committee had undergone some change in its wage and hour provisions. Instead of a fixed standard set by Congress with power to raise it by Board order, the new bill provided that there should be but one set of standards and those should be set by the Board. The space for variation was drastically reduced because the Board could not fix wages higher than 40 cents an hour or hours lower than 40 per week. The concept of "substandard" wages and hours did not again appear. However, in fixing the standards under the Senate Committee Bill the Board was to consider exactly the same conditions that were to have been controlling under the original bill[90] (and the standards were not to be applied if they would curtail earning power or curtail opportunity for employment). It was declared to be the policy of the Board to reach the maximum wage and minimum hours as quickly as was economically possible. In an effort to quiet the fears of union officials concerning collective bargaining a section was added specifically announcing that nothing in the act was to be construed as interfering or diminishing in any way the right to bargain collectively for standards higher than were set up under the act.[91]

The Senate retained the wage and hour provisions but added two more factors to be considered in setting minimum wages. Besides the four previously enumerated the Board was to consider (1) discriminatory freight rates, and (2) local economic conditions.[92]

The wage and hour provisions remained substantially the same in the First House Committee Bill but the factors to be considered in fixing the minimum wage were again slightly changed. The provision that discriminatory transportation costs or freight rates were to be considered altered to read "the relative cost of transporting goods from points of production to consuming markets."[93] An additional consideration was the "differences in units costs of manufacturing occasioned by varying local natural resources, operating conditions, or other factors entering into the cost of production. The Bill provided that the wage and hour regulations should apply to

[89] This attempt to prevent the minimum from becoming the maximum could only be effective as to those employees whose standards were so low that a labor standard order could be issued concerning them. Thus there was nothing to keep an employer from reducing wages of employees outside the coverage of the act. *Hearings*, pp. 38-39, 61, 78.

[90] Senate Committee Bill, §§4(b), and 4(c).

[91] Senate Committee Bill, §5.

[92] Senator Black announced that these provisions were really contained in the conditions set out in the senate committee bill, therefore they added nothing, merely made it certain that the new factors would be considered. 81 CONG. REC. 7892 (1937).

[93] §4(b).

workers without regard to sex,[94] and also contained further safeguards for collective bargaining. A labor standard order could issue only if the Board found that existing collective bargaining facilities were inadequate or ineffective or that collective bargaining agreements in that occupation did not cover a substantial portion of the employees.[95] Nor could the order set a lower wage or higher hours than the minimum wage and maximum hours prevailing for like work in the locality where the order was effective unless the local standards were higher than the Board could set under the statute.[96] And finally, the minimum wage and maximum hours established in an occupation by collective bargaining were to be prima facie evidence of the appropriate minimum wage or maximum hours to be established for like work.[97] These are actually further conditions on the issuance of labor standards although not directly in that section of the bill.

When the Second House Committee Bill shifted the authority to set wage and hour standards from the Administrator to the wage and hour committees, it was only natural that the committees should be bound by the same considerations that had guided for the Administrator. In setting up the wage and hour committees the Administrator was directed not to appoint them in occupations where no employees received less than 40 cents an hour or worked more than 40 hours per week.[97a]

The most rigid standards of all were contained in the AFL bill; a minimum wage of 40 cents and a maximum workweek of 40 hours, with no more than 8 hours any one day.[98] The hours provisions were not to apply in certain cases of emergency.

The bill introduced at the regular session contained a rigid progressive scale which required 25 cents for the first year, 30 cents for the second year, 35 cents for the third year, and 40 cents after the third year.[99] Likewise the maximum hour provisions lowered each year from 44 hours the first year, to 42 hours the second year, and 40 hours after the second year, with no more than 8 hours in any one day.[100] This was the first administration bill which did not leave the way open for differentials and that caused a storm of protest on the floor of the House from some of the Southern representatives, the most vocal of whom was Representative Cox of Georgia. This was the first time that the undercover fight which had been going on over the problem of differentials had been carried to the floor.[101]

The Ramspeck amendment contained substantially the same provisions concerning wages and hours as the First House Committee Bill. However, he did introduce a new concept in providing that the Board should calculate "weighted average" minimum wages in a given industry.[102] The minimum set could not be more than five cents per hour more than this weighted average and wages could not be raised

[94] §2(c).
[95] First House Committee Bill, §5(b).
[96] §5(c).
[97] §5(d).
[97a] Second House Committee Bill, Sec. 4(b).
[98] §2.
[99] §4.
[100] §5.

[101] But see statement by Mrs. Norton that one reason the bill was recommitted at the Special Session was because it contained differentials. 83 CONG. REC. 7275 (1938).

[102] The "weighted average" was calculated by taking the total pay roll and dividing by the total number of workers.

more than five cents in any one 12-months period.[103] The Board could not fix maximum hours under 40 nor over 48 per week except in case of certain plans to employ on a yearly basis.[104]

The conference agreement was a compromise between the other bills. The rigid scale of wages and hours was retained in the milder form of 25 cents for the first year, 30 cents for the next six years, and 40 cents after the seven year period. Hours were 44 the first year, 42 the second, and after that 40 per week.[105] However, flexibility was provided for wages by establishing industry committees which have power to investigate and recommend minimum wages (not over 40 cents) higher than provided for in the rigid scale. It is the policy of the act to reach this minimum of 40 cents as soon as economically possible and the rigid scale is merely to be certain that at the end of the seven years all industry will have reached that level.[106] As soon as practicable the Administrator is to appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce. The members are to equally represent employers, employees and the public, and geographical regions in which the industry is located are to be considered in the choice. From time to time the Administrator is to convene the industry committees to consider the question of minimum wages in the industry it represents. The committee has power to make such classifications within an industry as are necessary to fix for each classification the highest minimum rate which will not substantially curtail employment in the classification, and will not give a competitive advantage to any group in the industry. In determining whether such classifications should be made, in making such classifications, and in determining the minimum wage rates for such classification the industry committee shall consider among other relevant factors the following: (1) "competitive conditions as affected by transportation, living, and production costs; (2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and (3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry." However, no classification shall be fixed solely on a regional basis.[107] As in the previous bills it was provided that no classification should be made on the basis of age or sex.

The industry committee is then directed to file a report containing their recommendations with the administrator, who after notice and hearing to interested parties shall by order make the recommendations effective if he finds that they are made in accordance with the above enumerated standards; otherwise he shall disapprove of the recommendations and shall refer the matter to the same committee or to a different committee. He must either accept or reject the recommendation for he has

[103] §4(b). [104] §4(c).

[105] No eight hour a day maximum was inserted because of a feeling on the part of the conferees that it was, after all, an individual matter for the employees as long as the total hours per week were controlled. 83 CONG. REC. 9257 (1938). [106] *Id.*, p. 9164.

[107] Congress intended that there might be differentials but they must be based on facts, not on geography. 83 CONG. REC. 9256-9257 (1938).

no authority to alter it. Seven years after enactment of the law wage orders become ineffective except under particular circumstances. In making wage orders the Administrator shall define the industries and classifications therein to which they are to apply and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of the orders. No order is effective till due notice has been given by publication in the *Federal Register*.

The final act contained a clause[108] that the act shall not justify any employer in reducing a wage which is in excess of the minimum required by law; or in raising a workweek which is lower than the maximum hours permitted by law.[109]

Exemptions. In examining the exemption provisions in the various bills the first thing which impresses one is the difference between the way the problem was attacked in the original bill and those which followed it. The original bill had few specific exemptions but placed broad discretionary powers in the Board to make necessary exemptions. As the bill progressed the discretion became more and more narrow and the specific exemptions became larger and larger. Probably most of the specific exemptions enumerated in the final act would have been brought under the original bill; but many exemptions which might have been made under the original bill were not provided for in the final act. Of course in a bill of this kind, the section providing for exemptions is the logical point for pressure groups to point their activity.

There are really three general classes of exemptions to be discussed. The first is the exemptions from all the provisions of the bill; the second is the exemptions from the hours provisions; the last is from wages.[110]

In the original bill persons employed in an executive, administrative, supervisory, or professional capacity or as an agricultural laborer were excluded from the terms of the act. It is important to note that these terms were to be defined by the Board.[111] By the definition of "employer"[112] the United States, any State or political subdivision, or any labor organization (except when acting as an employer) are not included in the act. Small employers were to be exempt from the wage and hour provisions (not child labor) of the original act if the Board so provided by regulation or order. But the Board could bring them under the act if necessary to carry out the act or prevent circumvention of its provisions.[113] The number of employees which would entitle an employer to this exemption was left blank, to be filled in by Congress. An important condition to this exemption was a provision that the Board had power by regulation or order to determine the method of computing the number of

[108] Act, §18.

[109] The clause discussed in note 89 was carried through all the administration bills until the third house committee bill. In that draft there was no provision for labor standard orders as the clause disappeared. The provision added in the final act is much broader, applying to both wages and hours, and also by implication applying to all employees regardless of what wage they receive, or what hours they work. If the conferees had intended it to be construed more narrowly it would seem that they would have made it applicable only when wage orders were issued.

[110] Exemptions from child labor are discussed in the section on that subject.

[111] Original Bill, §2(a)(7).

[112] Original Bill, §2(a)(6).

[113] Original Bill, §6(a).

employees.[114] Although it was not specifically mentioned, the original bill was not intended to apply to retailers or service trades.[115]

The Board was authorized to provide by regulation or order that employment at wages below the legal minimum, or at hours above the maximum, or both, would not be an unfair labor practice in the following cases: learners and apprentices could be employed at such wages below standard as the Board should prescribe; persons whose earning capacity is impaired by age or physical or mental deficiency or injury could be employed at wages below standard under Board supervision; Board regulation or order could provide for deductions for board, lodging, and other facilities furnished by the employer if the nature of the work is such that the employer is obliged to furnish and the employee to accept such facilities; overtime employment in periods of seasonal or peak activity, or in maintenance, repair, or other emergency work; where, because of the nature and character of employment special treatment is justified.[116] It is clear from the above that the Board had very broad powers of exemption, in fact it is difficult to think of a case where the Board could not use the last provision as a basis for exemption.

Employers were to be exempt from the hours provisions of the act if they paid for the overtime at the rate of one and one-half times the regular hourly wage rate at which the employees involved were employed.[117] However, this exemption was drastically qualified by the fact that the Board could by order withdraw this exemption in any occupation, or could by order set up such standards of wages and hours as were necessary to carry out the purpose or prevent the evasion of the act.

The bill from the Senate Committee contained a number of new exclusions from the act:[118] employees in local retailing capacity, seamen, railroad employees subject to the Hours of Service Act, persons employed in taking fish, sea foods or sponges, and the definition of agriculture was broadened.[119] But apart from these exclusions the terms of the senate committee bill were substantially the same concerning exemptions with the exception that the provision for exempting small employers was not included.

An attempt was made to replace this exemption by amendment from the Senate floor[120] but the amendment was rejected.[121] The Senate Bill included new exclusions

[114] This was to prevent evasion by cutting large businesses into small units. *Hearings*, p. 49-50. It was assumed at the hearings that the number of employees would be somewhere between 10 and 20.

[115] *Hearings*, p. 35.

[116] Original Bill, §6(c).

[117] Original Bill, §6(b).

[118] Senate Committee Bill, §2(a)(7).

[119] It now included: farming in all its branches, cultivation and tillage of the soil, dairying, forestry, horticulture, market grading, cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, or any other agricultural or horticultural commodity, any practice ordinarily performed by a farmer, and finally it included the definition contained in subsection (g) of section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended.

[120] 81 CONG. REC. 7888 (1937).

[121] Apparently the committee did not have a very pronounced view either for or against the amendment. One strong point in favor of the exemption was that it made the administrative task much easier for by far the greater number of all employers employ less than ten persons, and yet their total employees are relatively insignificant when compared with the total employees who would come under the act. It was also argued that the high standards were likely to drive many small employers out of business and thus concentrate industry into fewer hands. On the other side it was claimed that the small employers

from the hours provisions of the act. These were (1) employees of any common carrier by motor vehicle subject to the maximum hours provisons of the Motor Carrier Act of 1935, (2) air transport employees subject to title II of the Railroad Labor Act of 1936, (3) employees of express companies subject to the provisions of the latter act.[122] A fourth exclusion was made (but from both wages and hours), by broadening the meaning of agriculture to include delivery to market as an incident to farming operations.[123]

Indirectly the meaning of agriculture was broadened in still another manner, by making a definition of "person employed in agriculture" who was excluded from the act.[124] As that term was used to refer to fresh fruits or vegetables, it included persons employed within the "area of production" engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state.[125]

Numerous exemptions were made from the hours provisions. They included persons employed in connection with ginning or bailing cotton, canning or packing of fish, sea food, sponges, picking, canning, or processing of fruits or vegetables, processig of beets, cane, and maple into sugar and syrup *when the services of the person were of a seasonal nature.*[126] Further exemptions from hours were made in case of employees in plants located in dairy production areas in which milk, cream or butter fat are received, shipped, or manufactured if operated by a cooperative association as defined in the Farm Credit Act of 1933,[127] and in the case of employees engaged in processing or packing perishable agricultural products during the harvest season.[128]

The most important changes made by the House Labor Committee concerned the exclusion of "outside salesmen" from the act,[129] a specific amendment that independent contractors and their employees engaged in transporting farm products from farm to market were not included in the definition of "person employed in agricul-

---

would furnish unfair and cutthroat competition. Most of the opposition to the exemption naturally came from big business. 81 CONG. REC. 7864 (1937).

[122] These amendments were accepted by the committee in conformance with their policy not to put employees under the jurisdiction of two administrative agencies. Apparently action had been taken in these occupations since the committee had drafted their amendment. 81 CONG. REC. 7875 (1937).

[123] This was accepted to clarify the act, the purpose being to make it clear that the exemption included all work done on a farm as long as it was incidental to agricultural purposes. 81 CONG. REC. 7888 (1937).

[124] Senate Bill, §2(a)(19).

[125] This amendment was introduced by Senator Schwellenbach specifically to protect the small apple grower in his state who had to go to a central unit to get his crop washed and sorted according to Department of Agriculture rules. The large grower could afford to own his own equipment and thus the operation for him would be part of agriculture. 81 CONG. REC. 7876 (1937).

The concept of "area of production" was intended to keep the exemption from applying to large central cold storage and packing houses. However, Senator Schwellenbach, in answer to a direct question, admitted that he couldn't define the term and said that the definition would have to be left up to the Board. 81 CONG. REC. 7879 (1937).

[126] Senate Bill, §4(c). The senate committee, because of the difficulty of legislatively drawing the line for seasonal production had given broad discretion to the Board to make seasonal exemptions. Sec. 6(b) of the Senate Committee Bill and Senate Bill. Therefore these specific exemptions did nothing more than make certain what the Board could have done if necessary. But in making the exemptions specific Congress left the way open for chiselers to evade the act.

[127] The definition was changed to that of Section 15 of the Agricultural Marketing Act by §4(c) of the First House Committee Bill.

[128] Senate Bill, §4(c).

[129] §2(a)(7).

ture" (and thus came under the act),[130] further cotton exemptions from hours, this time exempting those employed in ginning, compressing and storing cotton, or processing cottonseed[131] where employment was seasonal, also employees working during the hours from midnight to 6 A.M. in occupations not requiring continuous process operation (i.e., the "graveyard" shift) should be paid time and a half for their work. Women and children were forbidden to work during those hours.[132]

The exemptions and exclusions remained substantially the same in the amendment sent in by the committee at the special session.

A number of new exemptions were added in the Third House Committee Bill, on the floor of the house, and by the conference committee. They will be discussed together, in the form they appeared in the final act.

Some of the new exemptions from both the wages and hours provisions of the Act were:[133] any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce;[134] any employee employed in connection with the publication of a weekly or semi-weekly newspaper of less than 3,000 circulation the major part of which is within the county where the paper was printed and published;[135] any employee of a street, suburban, or interurban railway, or local trolley or motor bus carrier;[136] and the definition of agriculture was further broadened, this time with the express intent to exempt everything agricultural. As one senator said, "The definition seems to be all-inclusive, and we tried to make it so."[137]

Employers were to be exempted from the hours provisions (but not wages)[138] without paying extra for time above the maximum of the act if their employees were employed under a collective bargaining agreement (certified as bona fide by the National Labor Relations Board) which provided (a) that no employee shall work more than 1000 hours during any period of twenty-six consecutive weeks,[139] or (b) more than 2000 hours during any fifty-two consecutive weeks.[140] Also the ad-

[130] §2(a)(7). [131] §4(c). [132] §4(c). [133] Act, §13(a).

[134] It had been stated by the supporters of the wage and hour bills that they were not intended to apply to retail or service establishments (see *Hearings*, p. 35), but this amendment was inserted to make certain that none would be included. 83 CONG. REC. 7437-7438 (1938).

[135] The main argument in favor of the amendment was that the only effect of the act on such papers would be to force them to stop their out-of-state circulation, which is usually small, consisting mainly of home town folks who have moved away. Then it was also argued that the small weekly did not have an organization which would lend itself to such standards, an example of which was the typical society editor who collects items in her spare time. 82 CONG. REC. 1810 (1937).

[136] This exemption was to provide for the few cases where such businesses would come under the act (lines running interstate from cities on or near state borders). Such occupations have peak times in morning and evening so that the hours are difficult to regulate. Also it was known that they are generally strongly unionized and get relatively high wages. 83 CONG. REC. 7444-7445 (1938).

[137] 83 CONG. REC. 9163 (1938). [138] Act §7(b).

[139] This provision was to take care of certain special industries with peculiar conditions such as certain lumbering and mining projects where men have to be sent to isolated sections for periods of time, after which they return to civilization. However, while they are working the men desire, and need, to work long hours for there is generally nothing else to do, and they take the jobs in the first place with the intention of working long hours for a short period. 83 CONG. REC. 9257 (1938).

[140] This takes care of the employer who has worked out some scheme of annual employment in which the hours may fluctuate considerably. 83 CONG. REC. 9257 (1938). Representative Barton of New York had introduced a similar provision from the floor, but it had been rejected. 83 CONG. REC. 7442 (1938).

ministrator could exempt employers for not more than fourteen weeks in the aggregate in any calendar year in an industry found to be seasonal.[141] The above three exemptions only applied to the extent of 12 hours in any workday, or 56 hours in any workweek and over that wages had to be paid at the usual overtime rate under the act.

Some specific exemptions from the hours provisions were made in certain industries which for special reasons required long hours, as in the first processing of milk; while the aggregate 14 week exemption was specifically applied to certain seasonal occupations, particularly pertaining to agriculture.[142]

(C) CHILD LABOR

From the very beginning the supporters of child labor legislation (which, incidentally, seemed to include practically all members of Congress) divided into two distinct groups. One group favored the administration method of enforcement, to prohibit the interstate transportation of goods produced by child labor, and the other favored the so-called Johnson-Wheeler amendment based on the prison-made goods theory.[143] The Johnson-Wheeler amendment was substituted in the Senate for the administration child labor provisions by a vote of 57 to 28[144] but it was subsequently removed by the House Labor Committee and all efforts of its House proponents, led by Representative Martin of Colorado, to reinsert it were unsuccessful. The attack of the Johnson-Wheeler group did, however, cause certain amendments to be added by the House Labor Committee but the basic philosophy remained unchanged.

The original bill defined "oppressive child labor"[145] as the employment of any children under the age of 16; however, the Chief of the Children's Bureau of the Department of Labor could by the affirmative action of an order or regulation raise the age level to 18[146] in employments which he found to be particularly hazardous for children or detrimental to their health or well-being.

The Senate Committee lowered these standards by granting the Chief of the Children's Bureau power to permit employment of children under 16 in occupations which the Chief of the Children's Bureau should find would not interfere with their schooling or be detrimental to their health. This broad power to exempt children under the age of 16 drew the fire of the advocates of the Wheeler-Johnson amendment in spite of the fact that Senator Black explained on the Senate floor that the provision was only intended to apply during the vacation months when children

[141] It should be noted that this is an "aggregate" of fourteen weeks and it was not intended that the work need be done in consecutive weeks. 83 CONG. REC. 9164 (1938).

[142] §7(c).

[143] The reason the child labor section was included with the wage and hour legislation instead of forming a separate act was because of the feeling that it had a better chance to be declared constitutional as an integral part of general legislation intended to remove the burden of unfair labor practices on the free flow of interstate commerce. Alone, child labor may not be a very great burden, but when considered with the other factors, it has a better chance of surviving attack in the courts. *Hearings*, pp. 1-16.

[144] 81 CONG. REC. 7951 (1937).

[145] Original Bill, §2(a)(13).

[146] It should be noted that there is no requirement for a hearing before the Chief of the Children's Bureau can issue an "order." Compare with note 81 *supra*.

were not in school. In the face of this continued criticism the House Labor Committee accepted an amendment at the special session to limit the power to exempt to children between 14 and 16.[147]

Another important change was made by the Senate Committee Bill in exempting children employed in agriculture and those employed by "a parent or a person standing in place of a parent."[148] The exemption in cases of parents was removed in part by amendment from the floor during the special session to prohibit parents and those standing in place of a parent from employing children under 16 in manufacturing or mining.[149] It was explained that this was to prevent certain types of industrial work such as tiff mining where the parent might be tempted to employ his own children.[150]

The exemption in case of agriculture was narrowed considerably in the conference bill by a provision that it would only apply when children were not legally required to be in school.[151] This would seem to leave a way open for states to aid in protection of child labor by high compulsory school ages.[152] It must be remembered, however, that this standard is not as rigid as it seems on its face for most states have legal excuses for failure to attend school, and one of the commonest of these is the need to work.

A further exemption was inserted on the floor during the special session to exclude child actors engaged in the production of motion pictures.[153] This exemption was not included in the third house committee bill but was again inserted from the floor in the regular session and this time included children in theatrical productions.[154]

As early as the Senate Committee Bill the Board was directed to utilize the Chief of the Children's Bureau for all investigations and inspections with respect to the employment of minors[155] and to bring all actions to enjoin oppressive child labor practices.[156] This provision was enlarged in the Third House Committee Bill to place all child labor provisions under the administration of the Chief of the Children's Bureau.[157] In the conference bill the Chief's authority to bring injunction suits was limited because he had to act in this capacity under the direction and control of the Attorney General.[158]

[147] 82 CONG. REC. 1691 (1937).

[148] Senate Committee Bill, §2(a)(10).

[149] 82 CONG. REC. 1693 (1937).

[150] 82 CONG. REC. 1822 (1937). A "person in place of a parent" included only those actually in the legal position of a parent. 82 CONG. REC. 1694 (1937).

[151] Act, §13(c).

[152] It is true that violation of the compulsory school law would be an offense against the state in any case but this extra federal sanction should make evasion much more difficult particularly since the employer would be the one to suffer. The section has more meaning when it is realized that seven states have a compulsory school age of 18; seven of 17; 31 and the District of Columbia have 16; and only three states have under 16.—See testimony of Miss Katherine F. Lenroot, Chief of Children's Bureau of the Department of Labor, *Hearings*, p. 385.

[153] 82 CONG. REC. 1789 (1937).

[154] Members of the house did not feel that child actors were really within the group which child labor legislation was intended to benefit. 83 CONG. REC. 7441 (1938).

[155] Senate Committee Bill, §15(b).

[156] Senate Committee Bill, §12.

[157] §10(c).

[158] §12(b).

The original bill prohibited the interstate shipment of goods on which child labor had been used.[159] This was changed slightly in the Senate Committee Bill which carried a separate provision prohibiting the interstate shipment of goods which had been produced in an establishment in the United States in or about which within thirty days prior to removal any oppressive child labor had been used.[160] However, this provision was not to go into effect till 120 days after enactment.

One of the outstanding provisions of the administration child labor scheme was a clause providing that employers should not be guilty of violating the child labor law if the children they employed had a certificate issued under a regulation of the children's bureau certifying that the employee was above the oppressive child labor age, regardless of their true age.[161] This certificate requirement was intended to keep children from entering into employment illegally and protect the employer who was bona fine trying to observe the law. It was claimed that the Johnson-Wheeler amendment was purely penal and only operated after the child labor law had been violated.

The Johnson-Wheeler amendment[162] took three approaches to the child labor problem: (1) it prohibited interstate shipment of goods produced by child labor; (2) it used the prison-made goods theory of the Ashurst-Summers Convict Goods Act upheld in the *Kentucky Whip and Collar* case to prohibit transportation of goods produced wholly or in part by child labor into states for use there in violation of the law of that state; and (3) it required labeling of goods produced by child labor. The advocates of this method of enforcement pointed out that it had an advantage over the administration plan in that it directly challenged the decision in *Hammer v. Dagenhart* by its first prohibition, while at the same time it had an alternative method in the convict-made goods approach if the other should be found to be unconstitutional. On the other hand the convict-goods approach was severely criticized by many child labor experts[163] on the ground that it would be extremely complicated law to administer (convict-goods are made in relatively few places); another objection being that it would require new legislation in practically all states to make it effective, while the approach of the administration through requiring certificates fitted in with most of the state laws.[164] Another distinct advantage of the administration proposal was that the federal government could utilize the trained state child labor agencies to help control the issuance of certificates as had been done so successfully under the Federal Child Labor Act of 1916.

From the foregoing analysis it is obvious that few legislative enactments in our history have had such a stormy career and assumed so many different aspects within

[159] §7.
[160] See § 23(e).
[161] Senate Committee Bill, §2(a)(10).
[162] Senate Bill, §24.
[163] See testimony of Mr. Courtenay Dinwiddie, General Secretary, National Child Labor Committee, *Hearings*, pp. 396-403; and Mrs. Larue Brown, representing a group of national women's organizations, *Hearings*, pp. 389-394.
[164] Mrs. Norton stated on the floor that 43 of 48 states already have the certificate form of child labor law. 82 CONG. REC. 1783 (1937).

a comparatively short period of time as has this Act. The history of the Act affords invaluable material to the student of the legislative process in a democracy. In spite of trials and tribulations it is believed that the provisions finally made law are better than those of the original bill—even though admitted weaknesses remain. If great flexibility and wide administrative discretion have been eliminated in favor of more rigid standards, it should be remembered that, while the original characteristics would have permitted the accomplishment of much good beyond the scope of the present Act, they also contain in themselves the seed of many undesirable results and in the absence of an almost super-human job of administration might have done considerable harm to the cause they were designed to serve.

INDEX—THE WAGE AND HOUR LAW*

Adkins v. Children's Hospital, 327, 329.

ADMINISTRATION OF FLSA
devices made use of in, 334; function of industry committees in, 353, 359; in general, 368-390; policy of, 368; contrasted with National Labor Relations Act, 368; appropriation for, 370; fundamental problems of, stated, 372; utilization of state and local agencies, 376-377; part played by labor unions and trade associations, 377-378; function of Interpretative Bulletins in, 378-380; process of issuing regulations, 380-383; complaint procedure, 383-385; powers of investigation and inspection, 384; public opinion of, 388-389; effect of proposed amendments on, 389-390; economic coverage and, 406; economic difficulties in, 425.

ADMINISTRATIVE LAW
review of wage orders issued by Administrator, 360.

ADMINISTRATIVE PROVISIONS OF FLSA
legislative history of, 475-478.

AGRICULTURAL PROCESSORS
exemption from hours provisions, 347, 350.

AGRICULTURE
exemption of employees in, 350; child labor in, 402, 403-404.

AMENDMENTS OF FLSA
See FLSA.

AMERICAN FEDERATION OF LABOR (AFL)
position on minimum wage laws, 328; organization set up for enforcing FLSA, 377, 385; attitude on amendment of FLSA, 390; state law drafted by, patterned after FLSA, 455, 459; support given state bills, 463; attitude of, expressed by Green at hearings, 468; split on Bill in Senate, 469; opposition to House Bill, 470; Bill drafted by, rejected, 471.

APPRENTICES
exemption from wage provisions, 343, 344.

AREA OF PRODUCTION
difficulty of defining, 347, 350; hearings in connection with, 383.

AUSTRALIA
minimum wage law in, 326.

Bailey v. Drexel Furniture Co., 446.

"BACK SHOP" EMPLOYEES
question whether engaged in commerce, 335.

BROOKINGS INSTITUTION
criticism of "purchasing-power" theory, 423; quoted on 30-hour week, 428.

Carter v. Carter Coal Co., 440, 441, 448, 449, 450, 452.

CARVER, DR. THOMAS N.
quoted, 429.

CASSELL, DR. GUSTAV
quoted, 424.

CHILD LABOR AMENDMENT
purpose of, 391; ratification of, after prior rejection, 392; necessity for in spite of FLSA, stated, 403.

Child Labor Cases
See *Hammer v. Dagenhart* and *Bailey v. Drexel Furniture Co.*

CHILD LABOR PROVISIONS OF FLSA
in general, 391-405; federal regulation, prior to, 391; exemptions, 393; administration of, by Chief of Children's Bureau, 393; issuing of age certificates, 394-396; investigations, 396; determination of hazardous occupations under, 396-397; regulations pertaining to employment of children under sixteen, 397-398; newspaper work under, 400; inadequacies, stated, 402-403; economic adjustments under, 404; legislative history of, 486-489.

CIVIL AERONAUTICS ACT
wage regulation under, 332

CIVIL RECOVERY
by employees under FLSA, 385, 386.

CLARK, PROF. J. M.
quoted, 429.

CLERICAL EMPLOYEES
production of goods and, 440.

COLLECTIVE BARGAINING AGREEMENTS
as basis of exemption from hours provisions, 346; wage obtained under, contrasted with FLSA provisions, 368.

COMMERCE
See INTERSTATE COMMERCE

COMPLAINTS
method of handling under FLSA, 383-385.

CONGRESS OF INDUSTRIAL ORGANIZATIONS (CIO)
position on minimum wage legislation, 328; organization set up for enforcing FLSA, 377, 385; attitude on amendment of FLSA, 390; state law drafted by, patterned after FLSA, 455, 458; support given state bills, 463.

CONSTITUTIONAL LAW
extension of concepts of, to cover employees producing goods for commerce, 340; validity of FLSA under, in general, 431-453; commerce clause and §§15 (a) (1) and 15 (a) (4) of FLSA, 433, and 15(a) (2), 438-441; regulation of intrastate transactions, 438-439; division of governmental powers, 440; Tenth Amendment, stated to be no restriction on granted powers, 441-442; Fifth Amendment held to be no restriction on FLSA, 442-443; issue stated to be whether FLSA is primarily regulation of commerce or of local matters, 445; regulation of practices affecting commerce, 448-453.

*FLSA is used throughout this index for Fair Labor Standards Act of 1938.

CONTRACTS, GOVERNMENT
regulation of hours and wages in work done on, 325. See WALSH-HEALEY ACT.
COVERAGE OF FLSA
in general, 332-352; employees engaged in interstate commerce, 335-337; employees engaged in production of goods for interstate commerce, 337-342; segregation of employees' work, 342; exemptions, from wage provisions, 343-346, from hours provisions, 345-347, from wage and hours provisions, 347-350; defects in, stated, 352; economic, see ECONOMIC COVERAGE.
CRIMINAL PROSECUTION UNDER FLSA
handled by Justice Department, 376; experience with, 386.

DAVIS, GEO. H.
testimony at hearings, 468.
DEMOCRATIC PARTY
1936 plank on wage and hour laws, 464.
DIFFERENTIALS
consideration of, by industry committees, 357-358; difficulty in arriving at, 425. See LEGISLATIVE HISTORY.
DISTRICT OF COLUMBIA
minimum wage law invalidated, 327, 328.

ECCLES, M. S.
quoted, 428-429.
ECONOMIC COVERAGE OF FLSA
in general, 406-415; estimate of number of employees, 407; distribution of covered employees by industries, 407-408; distribution by states, 408; sources of shortage in estimate, 409-410; employees receiving less than statutory minima, 410; average earnings by minima, 411-412; average hours worked by industries, 413; effect of unemployment on, 414-415.
ECONOMIC IMPLICATIONS OF FLSA
in general, favorable, 416-421, unfavorable, 422-430; theory of free market stated, 416, and criticized, 416-417; distinction between labor and other commodities, 417; marginal productivity theory criticized, 417-418; protection afforded worker under FLSA, 418; contribution of FLSA to efficiency of industry, 418-420, and of workers, 420; beneficial effect of FLSA on wages in general, 420-421; ineffectiveness of FLSA to reach sweat shop conditions, 422; forced unemployment of marginal workers under FLSA, 422; "purchasing-power" theory criticized, 423, 424; planning of entire economy necessitated by wage regulation, 424; difficulty of establishing differentials, 425; elimination of wage spread between skilled and unskilled because of, 426; rigidities flowing from, 426; work-sharing criticized, 428; competition with foreign producers and, 429; stated to be favorable to large businesses, 429-430; disturbance of geographic trend of industry by, 430; unfavorable, summarized, 430.
EIGHT-HOUR DAY
on Government contracts, 325; on railroads, 325, 330.
Electric Bond and Share Case, 433.
EMPLOYEES
See COVERAGE OF FLSA
EMPLOYERS
See COVERAGE OF FLSA
ENGLAND
establishment of wage boards in, 326; economic effect of minimum wage law in, 418, 419.
EXECUTIVE AND ADMINISTRATIVE WORKERS
exemption of, 348.
EXEMPTIONS
See COVERAGE OF FLSA

FAIR LABOR STANDARDS ACT
amendment of, 369, 389-390, summary of provisions, 371.
FEDERAL GOVERNMENT
regulations of hours and wages in work done for, 325.
FEDERAL TRADE COMMISSION
powers of, used in administering FLSA, 384.
FREEDOM OF CONTRACT
hour legislation and, 325.

GOODS
for commerce, interpretation of, 340-342; destination of, materiality, 341; defined, 342.
GREEN, WILLIAM L.
testimony at hearings, 467-468.

Hammer v. Dagenhart, 435-437, 445-446, 467, 489.
HANSEN, DR. ALVIN H.
quoted, 425.
HANDICAPPED WORKERS
exemption from wage provisions, 345.
HEARINGS
in connection with regulations, 381-383; on FLSA, see LEGISLATIVE HISTORY.
HILLMANN, SIDNEY
testimony at hearings, 468.
HISTORY OF FLSA
See LEGISLATIVE HISTORY OF FLSA
HOUR PROVISIONS OF FLSA
exemptions from, 345; local nature of, stated, 451-452; legislative history of, 478-486.
HOURS
motives for legislation concerning, 323-324; regulation of, prior to 1938, 324-326; determination of number worked under FLSA, 350.

INDUSTRY COMMITTEES
in general, 353-367; recommendations of, 353; statutory provisions concerning, 354, 356, 357, 360; scope of, 355; appointment of members, 355-356; function of, 357; classifications by, 357; dissolution of, 358, 359; relations with Administrator, 360; evidence submitted to, 361; function of, in providing due process of law, 362-363; curtailing mem-

bership of, 363-364; representation of unorganized employers and workers on, 364; responsibility of public members, 365; suggestions for improvement of, 366-367.
INJUNCTION PROCEEDINGS
as remedy under FLSA, 385.
INTERPRETATIVE BULLETINS
use of in administering FLSA, 334, 378; grew out of lack of rule-making power, 378-380.
INTERSTATE COMMERCE
employees engaged in, 335-337; employees engaged in production of goods for, 337-342; part of goods sold in, 340; passage of title prior to sale of goods in, 341; constitutionality of FLSA provisions concerning, 433-441; power of Congress to govern competition in, 435-438; "harmful" commodities in, 436; growth of, as explanation of expansion of commerce clause, 440; power to prohibit, 444; practices affecting, federal power to regulate, 448-453.
INTERSTATE COMMERCE COMMISSION
power of over certain employments as basis of exemption from hours provision, 347.
INTERSTATE COMPACT
for wage and hour regulation, 330.

Jones & Laughlin Case. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*
JUSTICE, DEPARTMENT OF
relations with Wage and Hour Division, 376.

Kentucky Whip & Collar Co. v. Illinois Central R. R., 444, 489.
Kidd v. Pearson, 448.
KING, DR. WILLFORD, I.
quoted 427.

LABOR, SECRETARY OF
control over Wage and Hour Division, 373.
LABOR UNIONS
part played in enforcement of FLSA, 377, 385.
LEARNERS
exemption from wage provisions, 343; administrative procedure for handling, 382-383.
LEGISLATIVE HISTORY OF FLSA
narrowing of the powers of the Administrator, 334; in general, 464-490; *Original Bill*, drafting, 465, provisions of, 466; hearings on, 467-469; *Senate Committee Bill*, provisions of, 469; split in ranks of AFL toward, 469; *Senate Bill*, provisions of, 469-470; *First House Committee Bill*, provisions of, 470; development at Special Session, 470; *Second House Committee Bill*, provisions, 471; *AFL Bill*, provisions, 471; *Third House Committee Bill*, provisions, 472; *Ramspeck Bill*, provisions, 472; *Conference Bill*, provisions, 473, enacted into law, 473; table of bills, 474; administrative provisions, analysis of the several bills, 475-478; wage and hour standards, analysis of the several bills, 478-487; child labor provisions, analysis of the several bills, 487-489.
LEWIS, JOHN L.
quoted, 427; testimony at hearings, 467.

MASSACHUSETTS
first minimum wage law in, 327.
MAXIMUM HOUR REGULATION
See HOURS.
MERCHANT MARINE ACT OF 1936
wage regulation under, 332.
MESSENGERS
exemption from wage provisons, 343.
MINIMUM WAGES
See WAGES
Morehead v. People ex rel. *Tipaldo*, 327.
Mulford v. Smith, 434, 435, 444, 446.
Myers Case (Myers v. State Journal Co.), 401.

NATIONAL CONSUMERS LEAGUE
activity in behalf of minimum wage laws, 327.
NATIONAL INDUSTRIAL RECOVERY ACT (N. I. R. A.)
relation of FLSA to, 464.
NATIONAL LABOR RELATIONS BOARD
certification of bona fide employee representatives by, 346; criticism of, contrasted with reception of FLSA, 368.
National Labor Relations Board v. Jones & Laughlin Steel Corp., 438, 448, 449, 451.
NATIONAL RECOVERY ADMINISTRATION (NRA)
wage rate determination under, 330; deliberate pace of industry committees contrasted with, 354; differentials under, 358; child labor regulation under, 391; FLSA distinguished from, 467.
NEWSPAPERS
child labor provisions and, 400.

OFFENSES UNDER FLSA
summarized, 386-387.
ORGANIZED LABOR
See AMERICAN FEDERATION OF LABOR and CONGRESS OF INDUSTRIAL ORGANIZATIONS.
OVERTIME PROVISIONS OF FLSA
difficulty of compliance with, in case of non-productive workers, 339; application of, to employees receiving more than minimum, 351-352, 369.

PAY, REGULAR RATE OF
interpretation of provisions concerning, 351-352.
PRICES
effect of FLSA on, 421, 423; necessity of controlling because of wage regulation, 424.
PRODUCTION
employees engaged in, 337-340; statutory definition of, 337; work necessary to, criticism of administrative interpretation, 338-340; clerical employees and, 440; FLSA stated to be primarily concerned with, 447.
PROFESSIONAL EMPLOYEES
exemption of, 348.
PUBLIC OPINION
attitude toward administration of FLSA, 338-389.

QUESTIONS AND ANSWERS
use of in administering FLSA, 334.

RAILROADS
Eight-hour day law for, 325.
REGULATIONS
procedure followed in issuing, 380-383; revision of, 381.
REMEDIES UNDER FLSA
See CRIMINAL PROSECUTION, INJUNCTION PROCEEDINGS, and CIVIL RECOVERY.
RETAILING, LOCAL
exemption of employees in, 349; segregation from wholesaling, 350.
ROOSEVELT, FRANKLIN D.
attitude toward wage and hour legislation, 464; message to Congress concerning, 465-466.
RÖPKE, DR. WILHELM
quoted, 423.
RULE-MAKING POWER
lack of, in Administrator, as drawback to enforcement, 378.

SALESMEN
exemption of, 349.
Schechter Poultry Corp. v. United States, 441, 448, 449, 450, 452, 464.
SEASONAL INDUSTRIES
exemption from hours provisions, 345; lumbering as, 346; burden of proof in determining, 382.
SERVICE, VALUE OF
as basis of minimum wage laws, 329.
SERVICE ESTABLISHMENTS
exemption of employees in, 349.
STATE LABOR STANDARDS LEGISLATION
in general, 454-463; early laws, 454; non-existence of laws patterned after FLSA, 454-455; drafting of model bill for, 455, and provisions of, 456; constitutional basis of, 456; exemptions from model bill, 457; absence of child labor provisions in model bill, 458; analysis of bills introduced in state legislatures in 1939, 459-462; reasons for failure suggested, 462-463.
STATE REGULATION OF HOURS AND WAGES
prior to 1938. See HOURS and WAGES.
Stettler v. O'Hara, 328.
SUGAR ACT OF 1937
Wage standards under, 331, 332.
SUPREME COURT OF THE UNITED STATES
decision on hour regulation, 324; decisions on minimum wage legislation, 327; decisions on child labor laws, 391; decision on ratification of Child Labor Amendment, 392; prophecies as to treatment of FLSA by—opinion upholding, 433-443, invalidating, 444, 453; "reorganization" of, relation with wage and hour legislation, 464-465.
SWEAT SHOPS
drive to eliminate in England, 326; effect of nonmandatory laws on, 327; ineffectiveness of FLSA to eliminate, 422.

TEXTILE INDUSTRY
survey of wages in, 361.
TRADE ASSOCIATIONS
part played in administering Act, 377.
TRANSPORTATION
engaged in, contrasted with interstate commerce, 335.

UNEMPLOYMENT
industry committee recommendations and, 365; effect of, on economic coverage of FLSA, 414-415; of marginal workers through operation of FLSA, 422.
United States v. Ferger, 439.
UNITED STATES HOUSING ACT
wages paid under, 331.

WAGE AND HOUR DIVISION
appropriation for, 370; number of employees, 371; relations with Labor Department, 373; organization of, 374-375; relations with Department of Justice, 374.
WAGE PROVISIONS OF FLSA
exemptions from, 343; effect of, on interstate commerce, 439; local nature of, stated, 451-452; legislative history of, 478-486.
WAGES
regulation of, prior to 1938, 326-332; notices for legislation concerning, 324; early state legislation, 327; value of services and, 329; under NRA codes, 330-331; under Walsh-Healey Act, 331; multitude of factors affecting, 365; effect of FLSA on general level of, 420-421; control of, necessity for control of other factors as well, 424; for skilled workers, effect of FLSA on, 426.
WALSH-HEALEY ACT, 325, 331, 339.
West Coast Hotel Co. v. Parrish, 327, 329.
Wilson v. New, 439.